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Briefing Report to the Chairman,
Committee on Government Operations,
House of Representatives

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PROCUREMENT

Suspension and Debarment Procedures

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National Security and
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February 13, 1987

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

As requested by your letter dated January 13, 1986, we reviewed the implementation of suspension and debarment procedures at each of the selected major procuring agencies. Suspensions and debarments are used to protect the government against fraudulent and unethical contractors. You expressed concerns that many executive agencies are reluctant to initiate such procedures, and noted that this problem is further exacerbated by the lack of consistency among agencies in implementing these procedures.

You also commented that, in contrast to civil agencies such as the Department of Health and Human Services (HHS), the Department of Defense (DOD) has placed a higher emphasis on taking such actions. You specifically expressed concerns that HHS has still not initiated debarment proceedings against the Paradyne Corporation in spite of the fact that the company and its top officials have been indicted on various charges.

You asked us to determine whether

- specific actions need to be taken to strengthen the suspension and debarment process,
- suspension and debarment procedures should be established by statute,
- suspension and debarment actions should be assigned to the various boards of contract appeals, and
- explicit guidance should be given to contractors which explains what types of business practices could subject them to suspension and debarment proceedings.

Background

In 1981, the Senate Governmental Affairs Subcommittee on Oversight of Government Management held hearings and issued a report on the effectiveness of suspension and debarment procedures. Three key problems were identified during these hearings: (1) agencies were not honoring other agencies' suspension and debarment actions, (2) some agencies were not taking aggressive action against fraudulent contractors, and

(3) information on agencies' suspension and debarment actions was inadequate and untimely.

In 1982, the Office of Management and Budget's Office of Federal Procurement Policy developed guidance for carrying out administrative suspension and debarment procedures against fraudulent or unethical procurement contractors on a governmentwide basis. This policy, and the subsequent implementing regulations which went into effect in April 1984, were designed to alleviate problems identified during the 1981 congressional hearings.

Establishing these regulations has resulted in one key improvement—suspension and debarment actions taken by any one executive agency are now honored by all other agencies. However, we found that the other problems identified during the 1981 congressional hearings continue to exist.

While contractors have challenged the constitutionality of these regulations in court on the grounds that their due process rights had been denied, the government's position has been upheld.

Findings in Brief

DOD has taken the most suspension and debarment actions against fraudulent contractors since 1983. However, DOD has not fully implemented some changes recommended by the DOD Inspector General in May 1984 which could further enhance its efforts. We believe the small number of actions by some civilian agencies can be attributed to several factors, including the relatively low level of procurement actions, the absence of in-house criminal investigative units, the lack of auditors and contract administrators in contractor facilities, and reliance primarily on indictments and convictions as grounds for suspending and debarring.

None of the agencies we reviewed have completely implemented fully effective procurement fraud coordination and oversight systems to ensure that all appropriate fraud investigations are referred for action, and that ineligible contractors are not inadvertently awarded new contracts.

Regulations and procedures used by procuring agencies to carry out suspension and debarment actions vary. This lack of uniformity, while providing agencies with needed flexibility, has also resulted in contractors having to deal with a variety of different procedures for presenting their side of the story to the agency.

We found that the General Services Administration (GSA), which is responsible for compiling and disseminating the Consolidated List of Suspended, Debarred, and Otherwise Ineligible Contractors (the Consolidated List) governmentwide, continues to have difficulty providing this information on a timely basis, even though it publishes monthly updates to the required quarterly publication. GSA is in the process of implementing a system that will provide on-line access to its computerized information system to other procuring agencies.

The existing regulations contain some deficiencies and loopholes which could enable suspended or debarred contractors to obtain work under new government contracts. Efforts to close some of these gaps have been under consideration by procurement officials for about 2 years, but have not yet been adopted. We also found the provisions of the suspension and debarment regulations pertaining to the continuation and termination of existing contracts are unclear.

Our findings, conclusions, and recommendations are discussed below. Appendixes I through V contain further details.

DOD Accounts for Most Suspension and Debarment Actions

Since the new guidance governing suspensions and debarments was developed, DOD has consistently led the way in suspending and debarring fraudulent or unethical contractors. DOD actions totaled 582 in fiscal year 1985, nearly double the 296 actions it took in fiscal year 1983. DOD officials attribute this increase, in part, to support for this effort by high-level DOD officials, including the Secretary of Defense, and to increased contracting and procurement fraud prosecutions by the Department of Justice.

Of the five civilian agencies we reviewed, GSA accounted for most suspension and debarment actions. During fiscal years 1983 to 1985, GSA took 269 actions. In contrast, HHS took only one such action during that 3-year period; the Department of Transportation (DOT) took nine. (See tables II.1 and II.2 on page 28.)

We believe a number of factors have caused or contributed to this low level of action by some agencies. For one thing, the volume of DOD procurement dollars and individual transactions greatly exceeds those of any of the civilian agencies. In fiscal year 1985, for example, DOD procurement dollar obligations totaled over $163.7 billion, and DOD made 12.3 million individual transactions with business firms. In contrast, GSA

procurement dollar obligations totaled $1.4 billion and GSA made 37,090 transactions.

Because DOD procurement operations are so significant, it has implemented investigative and audit programs to better monitor these operations. DOD has a network of contract auditors, administrators, and inspectors with access to contractor facilities and records; and the services each have their own criminal investigative units, in addition to the Inspectors General. Since 1983, these investigative units have placed increased emphasis on investigating procurement and contract fraud. Civilian agencies do not have comparable in-house contract audit, administrative, or criminal investigative activities. They rely on their own Inspector General personnel for such assistance.

DOD is also in the process of implementing a coordinated fraud remedies program to help ensure that all fraud cases are referred for action and all appropriate remedies, including suspensions and debarments, are pursued. The civilian agencies we reviewed have no such program.

Agency officials provided additional explanations for the low number of actions. For example, while DOT takes few actions against procurement contractors, it takes approximately 100 suspension and debarment actions a year against Federal Highway Administration contractors. Officials at the National Aeronautics and Space Administration (NASA) explained that because DOD and NASA do business with many of the same contractors, NASA relies on DOD to take the lead in those cases where DOD is the major procuring agency. Generally, DOD is considered to be the "lead agency" in cases involving the major defense contractors.

Most Agency Actions Are Based on Indictments or Convictions

A suspension is the temporary exclusion of a firm or person pending the completion of an investigation and any ensuing legal proceedings. Generally, suspensions are used in those instances where a contractor is suspected of criminal misconduct. According to the Federal Acquisition Regulation (FAR), a criminal indictment may serve as grounds for suspension. Debarment, on the other hand, requires a higher standard of evidence, and is imposed for a specific period of time, usually not to exceed 3 years. A conviction or civil judgment for criminal conduct constitutes grounds for debarment. Debarment also requires the preliminary step of formally proposing such an action; suspension requires no such interim step.

We found that most of the agencies relied primarily on indictments and convictions as the bases for taking actions against contractors; some agencies, including DOT and NASA, have relied almost exclusively on these grounds. (See tables II.4 and II.5 on pages 30 and 32.) Because the agency has to independently investigate and assess actions taken in the absence of indictments or convictions, these actions are more timeconsuming and require greater and more aggressive efforts than actions based on indictments and convictions.

For example, in trying to protect the government's interests, agency officials are sometimes faced with difficult decisions regarding the timing of their actions. Preindictment suspensions are particularly difficult—this requires officials to obtain adequate information outside that held secret by the grand jury. Any information used in making a decision to suspend must be made available to the contractor. Department of Justice officials sometimes fear the release of this information will jeopardize their case, and have, on occasion, asked agency officials to delay taking any suspension or debarment action.

In spite of these difficulties, GSA and DOD officials have, on occasion, imposed a preindictment suspension to protect the government. In two cases we reviewed, the contractors took DOD to court to protest the actions, but the government's decisions were ultimately upheld. In contrast, HHS, which had considerable information at its disposal regarding the inadequate performance and alleged wrongdoings of the Paradyne Corporation, chose to wait until an indictment was issued, nearly 3 years after Paradyne was first accused of fraud. HHS took initial steps to debar Paradyne in March 1985 but did not finalize the debarment action, and instead suspended Paradyne based on the December 1985 indictment.

Some DOD Improvements Not Fully Implemented

DOD has not fully implemented some of the recommendations made by the DOD Office of the Inspector General in a May 1984 report to enhance DOD suspension and debarment efforts. The DOD fiscal year 1986 Authorization Act required DOD to submit a report to the Congress on DOD's implementation of these recommendations. DOD submitted this report to the Congress on May 19, 1986. In its report, DOD noted that it still had some areas to address, and stated that a joint high-level working group had been formed in April 1986 to address a number of suspension and debarment issues.

Agency Implementing Procedures Are Not Uniform

We found that agency regulations and procedures designed to supplement the governmentwide regulations varied, both in the degree of detail and in the decisionmaking approach. All of these procedures are consistent with the governmentwide regulations, as outlined in the FAR, but seek to more explicitly define agency officials' roles and to better describe aspects of the process.

Each agency has established those procedures which agency officials believe best suit the agency's organizational structure and requirements. For example, at each agency, the authority to suspend and debar has been delegated by the agency head. However, these delegations of authority vary. The Secretary of the Army has delegated this authority to the Assistant Judge Advocate General for Military Law; the Secretary of the Navy to the Assistant Secretary for Shipbuilding and Logistics.

This lack of uniformity has also resulted in contractors who have been suspended or proposed for debarment being faced with varying sets of rules for presenting their cases in opposition to an agency's decision, depending on which agency initiated the action. Rules governing such hearings ranged from informal fact-findings, such as those conducted by the Army, to formalized hearings before a board of contract appeals, as provided by the Defense Logistics Agency (DLA) regulations. Also, contractors do not necessarily present their cases directly to the debarring official. For example, contractors who have been suspended or proposed for debarment by the Air Force or Navy meet with a board, which in turn makes recommendations to the debarring official. Those suspended or proposed for debarment by the Army or DLA meet directly with the debarring official.

Deficiencies and Loopholes

We found that deficiencies, lack of clarity, and loopholes in the existing procedures and regulations may enable suspended and debarred contractors to directly or indirectly continue contracting with the government. Some of these problems were identified during the 1981 congressional hearings; others were recognized soon after the governmentwide procedures went into effect. However, only recently have executive agencies, led primarily by GSA, moved to finalize actions to improve the process and close potential loopholes.

Deficiencies

According to information obtained by the DOD Inspector General, government contracting officers have inadvertently, or unknowingly, contracted with suspended or debarred contractors, either because they

were not familiar with the regulations, or because information at their disposal was not up-to-date.

To enhance the timeliness of information, GSA has made efforts to increase the frequency of its Consolidated List with weekly updates to its monthly publications. The FAR requires only quarterly publication. However, in the absence of governmentwide access to GSA's computerized listing, GSA will continue to experience time lags necessitated by printing and mailing copies of this list. In September 1986, GSA established an interim measure to provide computerized access to its weekly updates. GSA estimates that governmentwide on-line access to the Consolidated List will not be available until calendar year 1987, at the earliest.

Efforts to determine the extent to which suspended or debarred contractors are receiving new government contracts have not been successful because of technical problems. In 1983, the President's Council on Integrity and Efficiency attempted to do so by matching computerized contract action data against the GSA Consolidated List. However, due to problems with the procurement data base, the Council had difficulty obtaining meaningful results.

Agency officials do not routinely monitor contracting actions to help ensure that ineligible contractors do not receive new contracts. The DOD Inspector General has tried to use computerized information to match contract actions with known suspended or debarred contractors, but only when it had reason to suspect a problem. In each of the three instances it investigated, the DOD Inspector General found that new contracts had, in fact, been awarded.

Regulations Unclear

Our review of DOD contracts awarded to Paradyne since it was suspended by HHS in December 1985 revealed that the FAR suspension and debarment provisions governing the continuation and termination of existing contracts (FAR section 9.405-1) need clarification or change. Under the FAR, contracts in existence before the suspension or debarment action may remain in effect, but cannot be renewed or otherwise extended unless compelling reasons exist for doing so. However, the FAR does not specify how this provision applies to the continuation of certain types of nonmandatory contractual agreements nor does it state whether an existing contract may be terminated for convenience or default.

We found that, in the absence of such guidance, agencies have differed in their handling of the continuation of certain types of nonmandatory contractual agreements that allow for multiple purchases over the life of the agreement. These agreements— basic ordering agreements and nonmandatory multiple awards schedules—define and establish overall contractual terms, but do not obligate the government to procure from that vendor until and unless individual procurement orders are placed.

GSA has told agencies they may write orders to renew leases on, and convert from lease to purchase, equipment procured from Paradyne under a nonmandatory multiple awards schedule. GSA officials consider nonmandatory schedules to be existing contracts, even though the government is not obligated to make any purchases. Such actions have the effect of extending the existing individual agency lease and procurement arrangements with Paradyne, without having to show compelling reasons for doing so. DLA, on the other hand, does not allow renewals, extensions, or new orders to be placed against its basic ordering agreements once a contractor has been suspended or debarred, unless compelling reasons exist.

With respect to the termination of existing contracts, the FAR provides that an agency may continue an existing contract once a contractor has been suspended or debarred unless the acquiring agency head or his designee directs otherwise. A decision as to the type of termination action, if any, to be taken is to be made only after a review by agency contracting, technical, and legal personnel. The FAR does not, however, state whether existing contracts may be terminated for default or for convenience. The FAR does provide that the government may terminate a contract for default without compensating the contractor for its losses if the contractor has failed to perform on that specific contract.

Based on these regulations, agency procuring officials told us that if they decide to terminate an existing contract because the contractor has been suspended or debarred, they must terminate for convenience unless the contractor was suspended or debarred for actions specifically related to a failure to perform on that contract. Terminations for convenience require that the government compensate the contractor for losses incurred as a result of the termination. Thus, if an agency decides to terminate for convenience an existing contract with a suspended or debarred contractor to protect the government's interests, it must compensate the contractor.

Loopholes

Current regulations do not cover all aspects of contracting, nor do they ensure that all actions are taken on a governmentwide basis. Specifically, only subcontracts where government approval of the subcontractor is required are covered. These are primarily subcontracts under major weapons systems prime contracts. The regulations do not preclude a suspended or debarred contractor from obtaining additional government work as a subcontractor where government approval is not required. Also, the regulations do not define in sufficient detail what constitutes an affiliate,[1] or how the existence of such an affiliation could be detected. DOD officials have been faced with a number of cases in which a suspended or debarred contractor reorganized, changed its name, and continued to obtain government contracts.

Although designed to ensure that actions taken by one agency are effective throughout the executive branch, the FAR does not adequately address proposed debarments. The regulation requires that agencies first propose debarment, then allow the contractor the opportunity to present its case to agency officials before they take final debarment action. Currently, a debarment proposed by an agency precludes the contractor from receiving additional contracts from that agency only. For example, after HHS proposed Paradyne for debarment, Paradyne was precluded from contracting with HHS, but continued to receive new contract awards from DOD. Contractors do not have the opportunity to comment before they are suspended. Suspensions immediately preclude contractors from receiving new contracts from any government agency.

Both GSA and DOD have proposed changes to the FAR that would close these loopholes through the Civilian Agency Acquisition and the Defense Acquisition Regulatory Councils; however, these changes have not yet been approved. Military and civilian officials are in the process of negotiating one set of proposed changes which will likely incorporate some, but not all, aspects of the original GSA and DOD proposals.

Conclusions

Based on our review of the existing suspension and debarment regulations and procedures, we believe the current process, with some changes and clarifications, provides an effective tool for protecting the government against the risks associated with doing business with fraudulent, unethical, or nonperforming procurement contractors. Essentially, this

[1] According to the FAR, an affiliate is a business concern or individual that either directly or indirectly controls another firm or individual, or a third concern that controls both. The FAR allows agency debarring officials to extend the application of suspensions or debarments to affiliates.

is a business decision, much like any consumer's decision, not to do business with fraudulent or unethical people. These regulations and procedures have been tested and upheld in federal court.

We believe the current process maintains an appropriate balance between protecting the government's interests in its contractual relationships, and providing contractors with due process. The process also provides procurement officials with the flexibility to weigh the government's need to procure against the need to protect the government from business risks. Under the FAR, procuring officials have the discretion to decide, in certain cases, that it may not be in the government's best interest to suspend or debar a contractor. Procuring officials also have sufficient flexibility to develop those procedures most suited to the needs of their agency, and to make decisions regarding the type and duration of action based on the unique circumstances that may be present in each case.

While the existing process provides an effective framework, we believe the process could be further strengthened and enhanced by correcting certain deficiencies, and by closing loopholes and expanding the coverage of the regulations. Most of these deficiencies and loopholes have been recognized by procurement officials, who are in the process of implementing changes to help alleviate these problems. Our observations and conclusions about the specific matters you asked us to address are discussed below.

Are Specific Actions Needed to Strengthen the Process?

Led by DOD and GSA, procurement officials are in the process of implementing changes to improve the timely dissemination of information through computerized access to the Consolidated List, and to better coordinate and monitor investigations and remedies. Civilian and military officials are also in the process of at least partially closing regulation loopholes regarding proposed debarments, subcontractors, and affiliates. We believe these efforts are important, and should be fully implemented as quickly as possible.

We believe each procuring agency should coordinate and monitor all procurement fraud investigations, as DOD has begun to do, to ensure that all available remedies, including suspensions and debarments, are considered. We also believe contracting officers should be encouraged to not limit their recommendations to those cases that are based on indictments or convictions. To do so will require continued cooperation and

coordination among investigators, contracting and debarring officials, and the Department of Justice.

Certain deficiencies are not being addressed. While officials acknowledge that the regulations regarding the continuation and termination of existing contracts are unclear, they have not proposed changes to clarify what types of procurement actions should be considered new contracts, or on what basis the government may terminate an existing contract with a debarred contractor. We believe the regulations should be amended to specify to what extent the provision concerning termination of existing contracts applies to individual orders placed under optional contractual arrangements, such as basic ordering agreements and nonmandatory multiple awards schedules.

Certain grounds for debarment that occur incident to one contract may seriously undermine confidence in a contractor's integrity and, as a consequence, its ability to carry out the terms of any of its existing public contracts. Conviction of a crime or civil judgement for fraud in connection with the award or performance of one government contract or subcontract, in our opinion, raises legitimate concerns not only about the ability of the contractor to perform that contract, but also about its ability with respect to other public contracts it may hold. Consequently, we believe that the FAR should be amended to require that each public contract include a clause allowing the government to terminate that contract under default conditions if the contractor is debarred for criminal or fraudulent actions taken in connection with that or any public contract.

Since contractor actions unrelated to the existing contract may provide the basis for multiple default terminations, we regard such a provision as an extraordinary remedy to be utilized selectively by government agencies. We expect that agencies would employ such a remedy when their concerns about a contractor's ability to carry out its existing contracts far outweigh the other considerations that must be evaluated before any such contracts are terminated. Such considerations include (1) the importance of the contractor to the agency's acquisition program; (2) the availability of supplies and services from other sources; and (3) the urgency for the supplies or services and the time needed to obtain them from other sources.

While we believe the regulations provide agency officials with needed flexibility in establishing agency implementing procedures, we also believe debarring officials should ensure that, to the extent practicable,

a uniform set of procedures is used when contractors meet with agency officials to present their side of the story. The DOD Inspector General recommended such uniformity for DOD in 1984, but DOD has not yet acted on this recommendation. We found no efforts towards such uniformity among the civilian agencies.

Do Procedures Need to Be Established in Statute?

It is not clear that establishing suspension and debarment procedures in statute would improve the process. We believe the existing regulations, with some changes and clarifications, provide sufficient authority for officials to take timely action, while allowing them the flexibility to consider each case on its own merits.

A bill proposed in the Congress in 1984[2] would have required the government to complete all hearings before making a suspension or debarment decision. Currently, debarring officials are able to prevent a contractor from obtaining new government contracts through suspension and proposed debarment actions before such a hearing is required. We believe such a statute would not be in the government's best interest because it would unduly delay the suspension and debarment process, which already provides contractors with due process.

Is There a Need to Assign Actions to the Various Boards of Contract Appeals?

We see no specific reason to require that suspension and debarment decisions be made by the boards of contract appeals. We believe such an approach would unnecessarily slow down the process. These boards are chartered to decide contract disputes between the government and contractors, and are quasi-judicial.

We also believe it would not serve the government's interest to further add to the boards' work load by requiring that they also hear suspension and debarment cases.

Is There a Need to Provide Explicit Guidance to Contractors?

We believe the FAR provides sufficient guidance to contractors regarding the types of actions that might subject them to suspension and debarment proceedings. For example, the FAR clearly states that conviction of or civil judgment for the commission of a fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract are causes for debarment. It also states that a contractor may be debarred for violations of the terms of a government contract so

[2]Debarment and Suspension Reform Act of 1984 (H.R. 4798).

serious as to justify such an action, such as willful failure to perform in accordance with the terms of one or more contracts, or a history of unsatisfactory performance.

We believe the causes for suspension and debarment outlined in the FAR are sufficiently explicit, yet broad enough to provide for a variety of circumstances. One danger in attempting to more explicitly define each type of business practice that would be subject to suspension or debarment is that it might lead contractors to conclude that anything not specifically included would be acceptable.

Matters for the Committee's Consideration

The Committee may wish to periodically inquire about the status of procuring agencies' efforts to improve the suspension and debarment process, and to alleviate deficiencies. Specifically, these would include (1) efforts by GSA to provide governmentwide access to its computerized Consolidated List, (2) improvements in the coordination and monitoring of procurement fraud investigations and remedies, and (3) efforts to take suspension and debarment actions on preindictment and noncriminal grounds, in addition to indictments and convictions.

Recommendations

We recommend that the Civilian Agency Acquisition and the Defense Acquisition Regulatory Councils adopt changes to the FAR presently under consideration by the councils to (1) make proposed debarments effective governmentwide, (2) better define affiliation, and require that all prospective contractors certify whether they are affiliated with a suspended or debarred contractor, and (3) extend the coverage of the regulations to include all subcontractors.

For those deficiencies that are not currently being addressed, we recommend that these Councils adopt changes to the FAR to alleviate these problems. These would require that contractor hearings be carried out under a uniform set of procedures and that the regulations covering the continuation and termination of existing contracts be clarified. We also recommend the FAR be amended to define to what extent procurement orders placed under optional contractual arrangements, such as nonmandatory multiple awards schedules and basic ordering agreements, are to be considered contracts for the purpose of FAR suspension and debarment provision 9.405-1.

We further recommend that the FAR be amended to require that each government procurement contract contain a clause which states that the

government may terminate the contract under default conditions if the contractor is debarred during the course of the contract because of a conviction of a crime or a civil judgement for fraud in connection with the award or the performance of any government contract. The clause should specify that the decision to terminate be made only by the procuring agency head or a designee.

Objectives, Scope, and Methodology

In doing this review, we met with and examined documents provided by officials of the Office of Management and Budget, GSA, NASA, the Department of Energy (DOE), DOT, HHS, DOD, DLA, and the Departments of the Army, Navy, and Air Force. We also reviewed studies and papers prepared by the contracting and legal communities. Agency officials interviewed included suspension and debarment officials, representatives from the various Offices of General Counsel and Inspectors General, and the DOD criminal investigative units. These representatives were all from the various agency headquarters in Washington, D.C.

We selected the agencies for this review on the basis of their volume of procurement dollars. We also sought to obtain a mix in the level of suspension and debarment activity. Our review was limited to administrative suspension and debarment actions and to appropriated fund procurements; that is, those actions which come under the purview of the FAR.

We discussed key facts with responsible officials, and have included their comments where appropriate. As requested, we did not request official comments on a draft of this report. Our work was performed in accordance with generally accepted government auditing standards from February to June 1986.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time we will send copies to the Senate Committee on Governmental

Affairs and to the Chairmen, House and Senate Committees on Appropriation and Armed Services; the Secretaries of DOD, DOE, DOT, and HHS; the Director of the Office of Management and Budget; and the Administrators of GSA and NASA. We will also make copies available to others upon request.

Sincerely yours,

Frank C. Conahan
Assistant Comptroller General

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Abbreviations

DLA	Defense Logistics Agency
DOD	Department of Defense
DOE	Department of Energy
DOT	Department of Transportation
FAR	Federal Acquisition Regulation
GSA	General Services Administration
HHS	Department of Health and Human Services
NASA	National Aeronautics and Space Administration

Background

Contractor Qualifications: Concept of Responsibility

An essential step in every procurement involves determining whether an offeror is qualified to serve as a government contractor. This means that the prospective contractor must be responsible. Basically, the government, like private individuals and businesses, enjoys the unrestricted power to produce its own supplies, determine those with whom it will deal, and fix the terms and conditions on which it will make purchases.

The FAR stipulates that purchases shall be made only from, and contracts shall be awarded only to, responsible contractors. It also requires that prospective contractors must demonstrate their responsibility and, when necessary, the responsibility of proposed subcontractors. Contracting officers must resolve any doubts as to a potential contractor's responsibility by determining nonresponsibility when information does not indicate clearly that the prospective contractor is responsible. This is made on a contract-by-contract basis and applies only to a specific contract.

Integrity: One of the Standards of Responsibility

Some of the more important standards a prospective contractor must demonstrate to be found responsible include: (1) having adequate financial resources, or the ability to obtain them, (2) being able to comply with the required or proposed delivery schedule, (3) having a satisfactory performance record, and (4) having a satisfactory record of integrity and business ethics. The term "integrity and business ethics," as used with government contracts, implies the generally accepted notion of honesty and uprightness. Therefore, a nonresponsibility determination for lack of integrity may be properly made if there is adequate evidence of

- commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract;
- violation of federal antitrust statutes resulting from the submission of bids and proposals; or
- commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility as a government contractor.

Debarment and Suspension

Unlike responsibility determinations, which involve determining a potential contractor's qualifications on a contract-by-contract basis, debarment and suspension actions involve disqualification of firms or

individuals on a continuing basis from receiving all contracts issued by government agencies. The FAR specifically states that debarments and suspensions are not to be imposed as "punishment" for improper conduct, but rather as civil sanctions designed to protect the government's interest against the hazards of doing business with persons or firms of questionable integrity. These regulations are described in more detail on pages 24 and 25. Use of debarments and suspensions may either be prescribed by law (statutory), or contained in agency regulations (administrative).

Administrative Debarment

The first principal motive behind debarment, as previously stated, is to avoid certain "business risks" associated with entering a contractual relationship with a person or firm. Such risks relate directly to the procurement involved and include nondelivery of satisfactory products or services, waste of public funds, and contractor fraud.

According to the FAR, a conviction or civil judgment for criminal conduct constitutes "clear and convincing evidence" on which to base a debarment. A contractor or individual may be debarred for a specific period of time, usually not greater than 3 years, for committing fraud or other criminal offense, or for not performing satisfactorily on a government contract. Because the authority for such debarments is not based on any legislation, but rather in agency regulations, such debarments have also been characterized as "administrative" debarments.

Statutory Debarment

The second principal motive behind debarment actions is to persuade contractors to conduct themselves in ways that will encourage certain national or socioeconomic goals, such as equal employment opportunity, minimum wage standards, and environmental protection. Debarments based on a contractor's failure to participate in advancing these goals have been referred to as "inducement" debarments. They also have been frequently referred to as "statutory" debarments because they are based on provisions in the statutes.

Suspension

A temporary exclusion of a firm or person suspected of committing a wrongful act is called "suspension." Suspensions have generally been used in those instances where a firm or person is suspected of criminal misconduct, which might eventually serve as the basis for debarment. Suspension is used in these circumstances because going forward with a debarment proceeding might prejudice the government's investigation

and prosecution as well as the contractor's ability to defend against a criminal charge in court. Suspension action must be based on "adequate evidence" of wrongful conduct. The regulations indicate that an outstanding indictment for criminal conduct constitutes adequate evidence on which to base a suspension. This is a lesser standard of evidence than that required for a debarment.

Due Process Requirement

As mentioned earlier, debarment and suspension are not to be imposed as punishment. However, the consequences to individual contractors will vary depending on multiple factors such as: the size and prominence of the contractor; the ratio of government business to nongovernment business; the length of the contractual relationship with the government; the contractor's dependence on that business; and the contractor's ability to secure other business as a substitute for government business. Suspension or debarment can affect a contractor's bank credit; have an adverse impact on revenues and on the market price of shares of listed stock, if any; and create a critical uneasiness among creditors in general, to say nothing of "loss of face" in the business community.

Because suspension and debarment can have such serious and even fatal effects on a business, the courts have recognized that certain due process protections must be afforded before these serious measures are invoked. Contractors have three basic protection rights. The right to

- be notified of the grounds on which suspension or debarment actions are based,
- be given an opportunity to be heard, and
- challenge the grounds for the action taken.

While the basic concepts of due process and fairness do apply, the procedures in applying them can be less formal than court proceedings because the decision to suspend or debar is basically a "business decision" designed to protect the government's interests in contractual relationships involving commercial transactions.

1981 Congressional Hearings

While the authority to use administrative suspensions and debarments has been recognized for many years, the procedures governing these actions were revised in 1982 to enhance the effectiveness of these actions. Although the impetus for these revisions was a congressional investigation into the process, executive agency officials had started reviewing the process before the congressional review through the

establishment of the Interagency Task Force on Debarment and Suspension.

In 1981, the Senate Governmental Affairs Subcommittee on Oversight of Government Management held hearings and issued a report on the effectiveness of administrative suspension and debarment procedures. The Subcommittee had begun its inquiry into these procedures during the spring of 1980, when it learned of alleged improprieties in the performance of certain contracts awarded by a local housing authority in New Orleans, Louisiana, using federal funds provided by the Department of Housing and Urban Development. This inquiry gradually developed into a full-scale investigation into suspension and debarment procedures. The Subcommittee was primarily concerned with administrative, rather than statutory, suspension and debarment actions.

Following a yearlong investigation, the Subcommittee held 2 days of hearings (March 11 and 12, 1981). During these hearings, a number of federal agency officials testified, including representatives from our office, GSA, DOD, NASA, the Department of Housing and Urban Development, the Environmental Protection Agency, and the Department of Justice.

At the time these hearings were held, procedures for the debarment and suspension of contractors were provided for under separate civil and defense regulations—the Federal Procurement Regulations for civil agencies, and on the defense side, the Defense Acquisition Regulations. In addition, many of the civilian agencies had adopted their own regulations, primarily because of the need to tailor such procedures to their own unique procurement needs. Under these regulations, suspensions and debarments were only effective within the agency taking the action, not governmentwide.

The Federal Procurement Regulations also provided for GSA to maintain, update, and circulate the Consolidated List of Current Administrative Debarments by Executive Agencies (the Consolidated List). GSA updated and circulated the Consolidated List to all federal agencies on a semiannual basis. The list contained the names of firms and individuals who had been administratively debarred from any of the executive agencies, but was not required to contain the names of suspended contractors.

During the congressional hearings, the Subcommittee explored four specific cases involving contractors alleged to have defrauded the government, or not performed adequately on federal contracts. In three of

these cases, an agency had suspended the firms before an indictment. The Subcommittee found such suspensions, referred to as preindictment suspensions, to be particularly problematic. In its report, issued in July 1981 and entitled Reform of Government-Wide Debarment and Suspension Procedures, the Subcommittee identified three major problems with the existing administrative suspension and debarment system. These were

- many agencies not taking the necessary action to debar or suspend contractors they knew or suspected of being fraudulent or irresponsible,
- information on an agency's debarment or suspension action not always promptly or adequately being communicated to other agencies, and
- agencies failing to honor another agency's actions.

The Subcommittee also described the reasons it believed these three problems existed. Regarding the lack of action, the Subcommittee found that there were three primary reasons why agencies might not take such action to protect themselves against fraudulent or irresponsible contractors. These were (1) the lack of administrative procedures at some civilian agencies, (2) fear of jeopardizing a Department of Justice investigation, and (3) lack of aggressiveness or ignorance about the consequences of inaction.

The second reason was related specifically to preindictment suspensions—a number of agencies postponed the administrative action until the Department of Justice had completed its investigation. Without an indictment or conviction, agencies had to allow contractors the opportunity to hear the evidence and rebut the charges. Some agencies were reluctant to take an action which might result in the release of sensitive grand jury information to the contractor. The Subcommittee suggested that agencies use their own investigative materials to support their cases, and to work with the Department of Justice so that actions could be taken instead of indictments, when warranted.

The Subcommittee identified several reasons why information was not being disseminated as quickly and as thoroughly as possible. For example, the Consolidated List was circulated only twice a year, was not required to include suspensions, did not cite the effective period of the debarments, and was not being distributed automatically to all government contracting offices. It also noted that DOD's Joint Consolidated List, which DOD maintained separately from the GSA list, did not list firms suspended or debarred by civilian agencies. The GSA list included actions taken by both defense and civil agencies.

Based on its findings, the Subcommittee made several recommendations which it presented to the Interagency Task Force on Debarment and Suspension and included in its July 1981 report. One major recommendation was that new governmentwide procedures be established which would require that all suspensions and debarments be effective governmentwide. The Subcommittee also said it would consider enacting legislation to make this governmentwide application statutory. Such legislation was in fact proposed by Senator Carl Levin, a Subcommittee member, on November 21, 1981 (S. 1882), but was not enacted.

However, the Congress did legislate this requirement for DOD. As part of the DOD Authorization Act of 1982 (Public Law 97-86, section 914), enacted on December 1, 1981, the Congress created a new section 2393 in title 10 of the U.S. Code, which prohibits DOD from doing any new business with contractors that have been debarred or suspended by another federal agency, unless a compelling reason exists to do so. This legislation further requires that any such compelling reasons be justified in writing, and submitted to GSA, who will keep them on file.

To enhance communication, the Subcommittee recommended that GSA's Consolidated List be computerized, distributed on a quarterly rather than a semi-annual basis, and be required to include all suspensions as well as debarments. It also recommended that contracting officers be required, by regulation, to review the Consolidated List and to not award contracts to anyone on the list unless the agency determined that compelling reasons existed for doing so.

To promote aggressive action, the Subcommittee recommended that all agencies establish in-house administrative procedures, and that the Department of Justice encourage agencies to pursue administrative actions when sufficient evidence of fraud or poor performance existed. The Subcommittee also suggested that any new regulations issued be streamlined so as to increase the availability and usefulness of such procedures to all federal agencies.

Governmentwide Regulations Developed

Based on the Subcommittee's report, and on its own assessments of deficiencies in the suspension/debarment process, the Task Force on Debarment and Suspension, headed by the Office of Management and Budget's Office of Federal Procurement Policy, developed guidance on governmentwide suspension, debarment, and ineligibility. This guidance, issued as Office of Federal Procurement Policy Letter 81-2 and effective as of

August 30, 1982, adopted many of the Subcommittee's recommendations, including making suspensions and debarments effective governmentwide, and expanding the Consolidated List to include all suspended, debarred, or otherwise ineligible contractors.

It also set forth requirements that agencies establish procedures for prompt reporting, investigation, and referral of appropriate cases to the debarring official; for the debarment decisionmaking process to be as informal as practicable; and notices to contractors regarding suspensions or proposed debarments. Under this policy letter, all contractors suspended or proposed for debarment were given the opportunity to rebut the agency's decision.

The procedures and policies outlined in the policy letter remained in effect until they were implemented by the FAR, subpart 9.4 (48 C.F.R. sect. 9.400 et seq). The FAR replaced the Federal Procurement Regulations System, the Defense Acquisition Regulation, and the NASA Procurement Regulation, and now serves as the procurement regulation for all executive agencies. The FAR has been in effect since April 1, 1984; modifications and changes have been made since that time, as needed.

FAR subpart 9.4 prescribes the policies and procedures which govern the nonstatutory debarment and suspension of contractors by all executive agencies. It applies only to procurement prime contracts made with appropriated funds, and only to those procurement subcontracts which are subject to government consent. Under the FAR, each agency is to designate a debarring official and establish procedures. The FAR also describes the role of GSA in compiling, maintaining, and disseminating the Consolidated List, similar to that recommended by the Subcommittee.

According to the FAR, once a contractor has been suspended or debarred by an agency, executive agencies are not to renew or otherwise extend current contracts or award new contracts to that contractor unless the agency head (or designee) states in writing the compelling reasons for doing so. Debarment and suspension actions do not necessarily affect contracts in existence before the action—such contracts may continue.

The FAR states that suspensions and debarments are discretionary acts, to be taken only in the public interest and for the government's protection. It outlines causes for suspension and debarment, and relies on the same standards of evidence as did the Federal Procurement Regulations. Causes for debarment include conviction of, or civil judgment for,

- commission of a fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract;
- violation of federal or state antitrust statutes relating to the submission of offers;
- commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or
- commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.

A contractor may also be debarred for violating the terms of a government contract or subcontract, such as willful failure to perform in accordance with the terms of one or more contracts, or a history of failure to perform, or of unsatisfactory performance on one or more contracts. A contractor may also be debarred for any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor. Thus, a contractor need not have committed fraud or be convicted of an offense to warrant being debarred. Debarments are to be for a period commensurate with the seriousness of the cause, but are generally not to exceed 3 years.

A contractor may be suspended, based on adequate evidence, of any of the offenses cited as grounds for debarment except willful failure to perform, or a history of poor performance. However, while debarment requires a conviction of any of these offenses, a suspension can be based on an indictment. Unlike debarments, suspensions are temporary measures taken pending the completion of an investigation and any ensuing legal proceedings. As long as legal proceedings are initiated within 12 months of the date of the suspension notice, a suspension can continue indefinitely. However, if legal proceedings are not initiated within that period, the suspension must be terminated, unless a 6-month extension is requested by an Assistant Attorney General. If legal proceedings are not initiated within 18 months, the suspension must be lifted.

Debarment requires a preliminary formal step of proposing such an action; suspension requires no such interim step. A contractor has 30 days to contest a suspension or proposed debarment after being notified. The debarring official must then consider this information in deciding whether to continue the suspension or to finalize the debarment.

Court Rulings Have Upheld Procedures

The existing regulations governing administrative suspensions and debarments have also been shaped by court rulings. Since the government began using suspensions and debarments as administrative tools, contractors have challenged various aspects of the process in court. However, the courts have recognized the government's need for these tools, and have not ruled against an agency's actions as long as the agency was able to demonstrate that it had used reasonable discretion, followed the regulations, given the contractor a meaningful opportunity to be heard, and that the decisionmaker had all the facts.

Since 1983, challenges to the government's suspension and debarment actions have increased markedly. However, court rulings have been consistent in reiterating some key points established over a decade ago in two watershed cases. One case, Gonzalez versus Freeman (334 F.2d 570, D.C. Cir. 1964), recognized the government's right to debar and set basic requirements for the procedural fairness that an agency must afford a contractor before debarment. In Horne Brothers versus Laird (463 F 2d 1268, D.C. Cir. 1972), the court recognized the government's right to impose preindictment suspensions where the suspending official has adequate evidence to suspect that a contractor is untrustworthy. In both cases, specific requirements outlined by the court have been incorporated in the FAR.

While the courts have upheld the authority of the government to carry out the existing suspension and debarment procedures, the process continues to be scrutinized and challenged. In 1984, H.R. 4798, entitled Debarment and Suspension Reform Act of 1984, was introduced in the Congress. This bill proposed a new set of administrative procedures, and would have stipulated that one independent debarment and suspension board hear and determine suspension and debarment cases governmentwide. The bill also proposed that the government take no action against a contractor until after a hearing had been held by an impartial tribunal. This legislation was referred to the Committee on the Judiciary, but was not enacted.

DOD Accounts for Most Suspension/ Debarment Actions

On a governmentwide basis, DOD has been responsible for taking most of the suspension and debarment actions against fraudulent or unethical contractors. On the civil side, GSA has taken the lead. It is not surprising that DOD leads in numbers of suspensions and debarments—DOD has by far the largest number of both procurement dollars and actions. In fiscal year 1985, DOD procurement actions over $25,000 totaled about $163.7 billion; with a total of about 12.3 million individual transactions. In contrast, fiscal year 1985 GSA procurement actions over $10,000 totaled about $1.4 billion, with 37,090 individual transactions, as shown in table II.3.

As shown in table II.1, DOD has increased the emphasis on using suspensions and debarments as a means of protecting the government against fraudulent or irresponsible contractors. Over the past 3 years, the total number of such actions has nearly doubled—from a total of 296 in fiscal year 1983, to a total of 582 in fiscal year 1985. DLA, which procures items on behalf of three military services, and the three services—the Army, Navy, and Air Force—have been responsible for taking all DOD actions. Of the four, DLA has consistently been the most active, while the Air Force has accounted for the least number of actions.[1]

DOD officials believe DOD actions have increased because of the high level emphasis placed on making use of suspensions and debarments as an administrative tool, and because more fraudulent contractors are being prosecuted by the Department of Justice. These officials [illegible] that the effectiveness of DOD efforts could be improved, and note that efforts are under way to implement recommendations made by the DOD Inspector General and others. However, some changes recommended 2 years ago have yet to be fully implemented. (See pp. 41 and 42 for further discussion.)

Among the five civilian agencies we reviewed, only GSA's actions increased to any extent between fiscal years 1983 and 1985—from 91 to 110 actions. Actions taken by three other civil agencies—DOE, NASA, and HHS—dropped during the 3-year period, as shown in table II.2.

[1]The DOD Office of the Inspector General has initiated a review to determine the effectiveness, adequacy, and timeliness of the Air Force's suspension and debarment actions.

Table II.1: DOD Suspensions and Debarments—Fiscal Years 1983-85

	FY 1983 S/D/total			FY 1984 S/D/total			FY 1985 S/D/total			3-year percentage change
DLA	71	54	125	40	132	172	82	136	218	+ 74
Army	35	41	76	28	68	96	48	117	165	+117
Navy	24	22	46	44	48	92	63	78	141	+206
Air Force	25	24	49	22	12	34	32	26	58	+ 18
DOD totals	**155**	**141**	**296**	**134**	**260**	**394**	**225**	**357**	**582**	**+ 97**

Sources: DOD Inspector General and GSA Office of Acquisition Policy

Table II.2: Suspension and Debarment Actions at Civilian Agencies—Fiscal Years 1983-85

	FY 1983 S/D/total			FY 1984 S/D/total			FY 1985 S/D/total			3-year percentage change
GSA	6	85	91	13	55	68	18	92	110	+ 21
DOE	10	7	17	4	7	11	0	3	3	– 82
NASA	2	4	6	2	4	6	0	5	5	– 17
DOT	0	0	0	0	3	3	2	4	6	+100[a]
HHS	0	1	1	0	0	0	0	0	0	–100

[a]Based on 2-year results, because the fiscal year 1983 figure was 0.

Source: Based on individual agency statistics

Few Actions Taken by Some Agencies

We found a number of reasons why civilian agencies other than GSA are taking few suspension and debarment actions. Some may be attributed to the lack of aggressiveness by agency officials, others to the specific characteristics of a particular agency's procurement activities.

While GSA does not have the largest procurement budget among civilian agencies, it does account for the greatest number of individual transactions. For example, while the dollar value of DOE procurement actions was greater than GSA's, it made far fewer transactions, as shown in table II.3.

Table II.3: Civilian Agency Procurement Dollars and Transactions Over $10,000—Fiscal Year 1985

Dollars in billions

	Procurement dollars	Procurement transactions
DOE	$13 1	7,606
NASA	7 4	23,572
DOT	1 6	5,276
GSA	1 4	37,090
HHS	1 1	7,913

Source: Federal Procurement Data System Standard Report

Numbers of procurement transactions may, in part, account for the greater number of suspension and debarment actions GSA has taken. In addition, none of these agencies, including GSA, have the specialized in-house criminal fraud investigative capability that DOD has. They depend on the general vigilance of their Offices of the Inspector General for such investigations.

Agency officials also explained the low number of actions. For example, HHS officials told us that for the most part, they contract with research institutions and consultants, which they believe are more reputable than other types of contractors. However, others at HHS said they believe the agency is not aggressive in taking suspension and debarment actions, and noted that the HHS Inspector General has not participated in the process. HHS relies on contracting officers to initiate, refer, and coordinate suspension and debarment actions, with assistance from the Offices of Procurement Assistance and Logistics and the General Counsel. During our review, the HHS Inspector General had no ongoing contract fraud investigations other than that involving the Paradyne Corporation. (See pp. 35 to 37.)

While DOT has taken only 9 suspension or debarment actions against procurement contractors during fiscal years 1983-85, it took approximately 100 suspension and debarment actions per year against Federal Highway Administration contractors. NASA officials explained that because DOD and NASA do business with many of the same contractors, NASA relies on DOD to take the lead in those cases where DOD is the major procuring agency. Generally, DOD is considered to be the "lead agency" in cases involving the major defense contractors. One official from NASA's Office of the Inspector General also attributed the low number of NASA actions to the fact that NASA deals primarily with research and development contracts, as opposed to acquisition and procurement contracts.

According to one DOE official, because of the danger and security risk involved with nuclear energy, DOE contractors are heavily scrutinized during preaward surveys. Other agencies also conduct preaward surveys; we did not compare agency preaward systems to determine if DOE's preaward survey techniques are in fact more effective than those other agencies employ.

Most Actions Based on Indictments/ Convictions

Indictments and convictions continue to be the primary basis for suspending or debarring contractors, as shown in tables II.4 and II.5. Indictments and convictions are solid bases for taking suspension and debarment actions because they are specifically referred to in the FAR—an indictment constitutes adequate evidence for suspension, and a conviction is grounds for debarment. Tables II.4 and II.5 are based on our analyses of available documents.

Table II.4: DOD Basis for Suspension/ Debarment Actions—Fiscal Years 1983-85

	Fiscal year	Total actions[a]	Actions based on indictments/ convictions	Percent of total
DLA				
	1983	107	75	70
	1984	116	102	88
	1985	151	98	65
Army				
	1983	62	55	89
	1984	60	56	93
	1985	178	130	73
Navy				
	1983	36	33	92
	1984	79	78	99
	1985	133	129	97
Air Force				
	1983	20	11	55
	1984	31	28	90
	1985	39	36	92

[a]These numbers are lower than those in table II.1 because complete documents were not available on all actions

Within DOD, the Navy has relied most heavily on indictments and convictions in making decisions to suspend or debar contractors. On the other hand, DLA has been most active in taking such actions, particularly

debarments, based on noncriminal actions such as a contractor's willful failure to perform.

Navy officials stated that they have taken more actions to suspend or debar without indictments or convictions during the first half of fiscal year 1986. They noted that it has taken time for field personnel to understand that suspension and debarment referrals do not need to be limited to cases with indictments or convictions. Officials from all three services stated that they encourage such referrals.

GSA is the only one of the five civilian agencies we examined that has made an effort to go beyond relying solely on indictments or convictions as grounds for suspension or debarment. For example, in November 1983, GSA issued an operational guide for using debarment as a means of dealing with unsatisfactory performance. GSA's efforts are reflected in the suspension and debarment actions it has taken. (See table II.5.) Less than half of GSA's fiscal year 1985 actions were based on indictments or convictions.

Table II.5: Civilian Agencies Basis for Suspension/Debarment Actions—Fiscal Years 1983-85

	Fiscal year	Total actions	Actions based on indictments/ convictions	Percent of total
GSA				
	1983	91	54	59
	1984	68	43	63
	1985	110	45	41
HHS				
	1983	1	0	0
	1984	0	0	0
	1985	0	0	0
DOT				
	1983	0	0	0
	1984	3	3	100
	1985	6	6	100
DOE				
	1983	17	16	94
	1984	11	10	91
	1985	3	3	100
NASA				
	1983	6	6	100
	1984	6	4	67
	1985	5	5	100

Preindictment suspensions can cause problems, and may be contested by the contractor. For that reason, they are used infrequently. DLA, for example, does not like to issue preindictment suspensions because of these problems, and may instead move to debar a contractor on the basis of willful failure to perform. However, DLA and Navy officials pointed out that it is more difficult and more timeconsuming to adequately document evidence against a contractor in the absence of an indictment or conviction. The DOD Inspector General has continued to emphasize the need for the investigative offices and debarring officials to work together to develop evidence in place of, or in addition to, evidence developed for criminal proceedings.

DOT officials told us that debarring officials would rather wait for an indictment or conviction because they are not faced with having to independently weigh evidence and draw their own conclusions regarding innocence or guilt. NASA officials commented that their Inspector General's office (the major case referral source) often does not refer cases

immediately after discovery because they believe a suspension or debarment might jeopardize an ongoing investigation. In fact, NASA's Inspector General regulations discuss circumstances where sharing information may be inappropriate due to grand jury secrecy requirements. (See app. III.)

Completeness and Timeliness of Actions Taken

With the exception of HHS, all of the agencies have computerized fraud tracking systems, which are designed to track fraud investigations. However, because none of these systems could provide complete information about the results of these investigations, we were unable to fully determine whether agencies are seeking all appropriate remedies against fraudulent contractors, including suspension and debarment.

For example, in reviewing the computerized information systems within DOD, we found that neither the Defense Investigative Management Information System nor the four DOD criminal investigative offices' systems had complete information on indictments and convictions. Without complete information on such court actions, we could not determine whether DLA or the services may have missed cases where contractors should have been considered for suspension or debarment.

All of the DOD criminal investigative offices have computerized information systems in place, but officials we spoke with cautioned that the input was not always complete on each case. Investigative offices consider a case closed once an investigation is completed, and do not always record resulting remedies, some of which may take years to carry out.

GSA's tracking system, the Inspector General Information System, identifies cases referred for possible suspension and debarment action, but does not identify or track those investigations that were not referred to the debarring official. In its May 1984 report, the DOD Inspector General identified investigations it believed should have been referred to debarring officials, but were not. DOD and GSA suspension and debarment officials do, however, track cases that are specifically referred to that office. (See app. III for descriptions of these tracking efforts.)

Timeliness of DOD Actions

The amount of time it takes DLA and the services to act on cases referred to the debarring authority could not be determined for a number of reasons. This was due to the lack of complete information—the Navy, for example, does not maintain an historical case log, and could not, therefore, provide us with case referral dates. Even when such dates were

available, they did not provide a complete picture. For example, they signified when the case was referred to the debarring official, but did not state when the contracting officer had first forwarded the recommendation to suspend or debar. Also, some referred cases were sent back to the field because they were considered incomplete and had to be resubmitted.

With the information available, we did find out how quickly DOD acts in cases referred for suspension or debarment once an indictment or conviction is acquired. In spite of a DOD Directive which requires that DOD components act within 30 days of such actions, only DLA and the Air Force maintain logs which provide information on indictment/conviction and suspension/debarment dates for each case; the Navy and the Army do not. A high-level DOD working group is now reviewing the actual time taken from indictment to suspension during fiscal year 1985 in an effort to assess whether DOD officials are meeting this "30-day rule." (See p. 42.)

We found that in most cases, DLA and the services were not meeting the 30-day rule. Action times varied greatly, with some suspensions and debarments taking over a year, and in some cases, 2 or 3 years from the time of the indictment or conviction. We also found that efforts to meet this 30-day time frame have not improved over the past 3 fiscal years. For example, in fiscal year 1983, DLA acted on 39 of 53, or 74 percent, of suspensions based on indictments within 30 days, the highest percentage within DOD. In fiscal year 1985, this was true in only 11 of 44 suspensions, or 25 percent. The Army was the only other DOD activity to suspend any contractors within 30 days of indictment during fiscal year 1985. The Air Force did not meet this 30-day goal in any actions taken during fiscal years 1983-85.

Timeliness of Civilian Agency Actions

With the exception of GSA, suspension and debarment officials at the civilian agencies have not actively monitored contract fraud cases for potential suspension or debarment action. We were able to evaluate the timeliness of actions taken once cases were referred for suspension or debarment at three civilian agencies—GSA, DOT, and DOE. NASA does not maintain information on case referral dates. HHS' suspension of the Paradyne Corporation is discussed on page 35.

We did find that nine cases at GSA, DOE, and DOT took over 3 months to complete once they were referred; some took as long as 1 year. In fiscal year 1985, for example, 6 of the 42 applicable GSA cases, or 14 percent,

took longer; at DOT, 1 of the 3 cases, or 33 percent, exceeded this time period. The two cases DOT acted on in fiscal year 1985 took over 3 months to complete.

Reasons for Delays

In reviewing selected case files, we identified a number of different reasons why suspension or debarment actions were delayed. In some instances, the debarring official was not aware that a contractor had been indicted or convicted until some months after the court action; in others, suspension/debarment reports were not received from the field on time, or were not considered complete. Delays in debarments, once such action was proposed, were sometimes due to contractors asking for extensions beyond the 30 days normally allowed for a hearing.

Some of the most complex cases involved investigations that took up to 2 years to complete. In addition, such investigations did not always result in indictments being returned. In these cases, agencies sometimes faced difficult decisions as to how to protect the government's interests in the interim, or whether to pursue administrative actions even after prosecution was declined. Taking preindictment action requires obtaining adequate information which is not subject to grand jury secrecy rules. It also involves making judgments as to how much information can be used without jeopardizing the ongoing criminal investigation. Examples of such cases are described below.

HHS Suspension of Paradyne

On March 27, 1981, HHS' Social Security Administration awarded a contract to the Paradyne Corporation to install more than 1,800 new computer terminals to replace deteriorating and obsolete data communications equipment in the Social Security Administration's field offices. The contract provided for a lease with option to purchase, and was valued at about $115 million. However, allegations of fraud and unsatisfactory performance surfaced, and by 1983, several government investigations into Paradyne's activities were opened. Although HHS had considerable information available about Paradyne's alleged fraud, the department waited nearly 3 years from the time charges were first formally made against Paradyne until an indictment was issued, to suspend the Paradyne Corporation.

Several government investigations focused on Paradyne's contract with the Social Security Administration. In March 1983, the Securities and Exchange Commission, alleging violations of the antifraud and reporting provisions of the Securities Acts of 1933 and 1934, filed a civil action

against Paradyne for failing to disclose an alleged fraud against the Social Security Administration. Also in March 1983, the Department of Justice's Commercial Litigations Branch Civil Division opened a file to review civil fraud aspects of the matter. In July 1984, we issued a report[2] in which we concluded that numerous inadequacies in the Social Security Administration's management of the Paradyne contract jeopardized the integrity of major upcoming systems procurements.

In September 1984, the House Committee on Government Operations held hearings related to the alleged improprieties of Paradyne's contract with the Social Security Administration. During these hearings, our officials stated that they believed sufficient evidence existed for the government to initiate suspension and debarment proceedings against Paradyne.

The Committee subsequently issued a report recommending that HHS begin procedures to either suspend or debar Paradyne from future government procurements.[3] Also, toward the end of 1984, DOD considered suspending or debarring Paradyne on the basis of problems identified at the Social Security Administration, but did not.

HHS was faced with the problem of whether its own investigation would impede or impair other on-going investigations. HHS believed such an in-depth inquiry might interfere with or duplicate the efforts of the Securities and Exchange Commission and the Department of Justice. In November 1984, HHS requested the Department of Justice's assistance in conducting an in-house review of the Paradyne contract. Although Department of Justice officials kept the HHS Inspector General apprised of its criminal investigation, the Department of Justice decided that based on grand jury secrecy rules, it could not provide grand jury investigation information to persons not authorized to receive that information in the absence of a court order. HHS did not seek such a court order.

In March 1985, HHS proposed the debarment of Paradyne on the grounds that misrepresentations made by Paradyne during contract solicitation constituted a serious and compelling breach of the integrity required of responsible contractors. Because Paradyne contested the proposed debarment, HHS attempted to reach a settlement agreement with

[2]Social Security Administration's Data Communications Contracts with Paradyne Corporation Demonstrate the Need for Improved Management Controls (GAO/IMTEC-84-15, July 9, 1984)

[3]Improprieties in the Award and Management of the Social Security Administration Contract with Paradyne Corporation, H.R. Report Number 98-1125, 98th Congress, 2d Session (1984)

Paradyne. The settlement proposal contained three essential features: (1) Paradyne would establish a Government Contracts Control Group and Integrity Assurance Program, (2) the Social Security Administration contract would be modified to allow credit for "downtime" caused by equipment failures, and (3) the prompt payment discount for the purchase option would be revised.

In July 1985, HHS asked the Department of Justice to review the settlement agreement and comment on whether the proposed agreement would interfere with the grand jury investigation, or would otherwise be objectionable to the Department of Justice. The Department of Justice stated that it was imperative that the fraud aspects of the case be resolved before any agreement was reached with Paradyne. Furthermore, the Department of Justice stated that HHS may have underestimated the compensation it was entitled to for equipment failures.

On December 12, 1985, a federal grand jury returned a 14-count indictment against Paradyne—eight current and former officers and employees of the company and one former employee of the Social Security Administration—for bribery, making false statements, and conspiring to defraud the Social Security Administration. Based on this indictment, HHS suspended Paradyne 4 days later, on December 16, 1985.

Navy Suspensions

One Navy case involved Metal Services Center, a contractor accused of providing inferior metals for Navy ship construction. The government first learned of these allegations through a call to our hotline in June 1982. However, when the Navy contemplated suspending the firm in August 1983, Navy and Department of Justice investigators asked the Navy to delay taking such action. This was done to prevent information from being disclosed that might cause the contractor to destroy key evidence. The company and two of its officers were finally indicted in April 1984, and convicted in July of that same year. The Navy suspended the firm and the two officers in June 1984—2 years after the initial hotline call.

The Navy and DLA did make efforts to protect the government's interests before this suspension. In October 1983, the Navy alerted its contracting activities to request preaward surveys before awarding any new contracts to Metal Services, and to ensure that all material shipped directly from Metal Services conformed to specifications. However, this effort

did not prevent inferior materials from being installed on at least one battleship.

In another case, the Navy decided to suspend the Atlantic Construction Company in July 1983, before indictment, to avoid having to award this firm four additional contracts. The firm was being investigated for a number of fraudulent activities, but the Department of Justice had decided to investigate all of the allegations before issuing any indictments. The investigations were started in February 1983; indictments (73 counts) were not returned until September 1984. However, Atlantic Construction protested the suspension in court. The claims court ruled that the Navy should have given the contractor a hearing before the suspension, and prohibited the Navy from awarding or carrying out the four contracts in question.[4] As a result, the Navy conducted a proceeding at which the contractor was allowed to make a presentation, but concluded that the suspension should remain in effect. Atlantic Construction again took the Navy to court, contending that it still had been denied due process because there had been no fact-finding hearing. The United States attorney had specifically asked the Navy not to have a fact-finding hearing in an effort not to jeopardize the investigation. The claims court ruled that the notice and hearing the Navy provided the firm were inadequate.[5]

The claims court decisions were eventually overturned on appeal by the U.S. Court of Appeals for the District of Columbia. The court held that the notice and hearing provided by the Navy was adequate, and concluded that a trial type hearing was not required to suspend a government contractor. Nevertheless, one Navy official estimated that it cost the Navy a good deal of time and money to defend its preindictment suspension. The official estimated the delays in carrying out the four contracts cost the government hundreds of thousands of dollars, and prevented badly needed construction repairs from being carried out.

Air Force Preindictment Suspension of Ontario Air Parts

In the case of Ontario Air Parts, a number of factors contributed to the Air Force's delay in taking action. The Air Force's Office of Special Investigations had begun an investigation into alleged deficiencies in conduit assemblies supplied by Ontario in October 1983. These conduit

[4]ATL, Inc. v. U.S., 3 Cl. Ct. 274-275 (1983) (40 FCR 171)

[5]ATL, Inc. v. U.S., 4 Cl. Ct. 374 (1984) (41 FCR 96, 128)

assemblies were to be used on the engines of T-38 and F-5 aircraft, and are critical to flight safety.

On November 26, 1984, the Air Force Debarment and Suspension Review Board recommended that Ontario, its president, and general manager be debarred before indictment. Debarment was officially proposed on January 28, 1985, but Ontario Air Parts was not actually debarred until July 5, 1985—over 5 months after debarment was proposed, and nearly 2 years after the Air Force had started investigating the company. Delays in the final debarment action were due, in part, to Ontario's submission of extensive written materials, and an appearance before the Board in May 1985. In addition, on February 11, 1985, Ontario took the U.S. Government to court to protest the proposed debarment, contending that due process entitles a contractor to a hearing before an agency can propose debarment. The U.S. District Court upheld the Air Force's action and dismissed the case on March 8, 1985.

Measures Taken in Place of Suspensions/ Debarments

In some instances, federal agencies have entered into settlement agreements with contractors in place of suspension or debarment. These agreements, usually reached after the firm has already been suspended or debarred, outline the measures the contractor has taken, or agrees to take, which the government has identified as needing improvement or correction. In this way, the contractor is able to demonstrate present responsibility, and need not be barred from doing business with the government.

DOD has made the greatest use of these agreements. DLA and the Army have negotiated 22 and 26 such agreements, respectively, and have settled with a variety of firms. The Air Force has entered into three such agreements, all with major contractors—General Electric, Sperry, and Rockwell International. The Navy has entered into formal agreements with two major contractors—Tracor and General Dynamics—but has settled informally with others. Because most Navy settlements do not result in formal agreements, we were unable to compile statistics for that service.

Two of the five civil agencies we studied—NASA and DOE—have also negotiated settlement agreements with contractors, either in place of or in conjunction with suspensions and debarments. DOE has negotiated one settlement agreement in place of debarment, but the contractor was later debarred when it did not comply with the agreement. NASA has

entered into two settlement agreements—one resulted in the suspension being lifted. In the other case, NASA did not debar the company after it agreed to fire the company's president, who was debarred. However, NASA officials are now questioning whether the spirit, if not the letter, of that agreement has been violated.

One GSA official, on the other hand, said GSA does not normally enter into settlement agreements because it does not believe a present responsibility determination should be subject to compromise. This official stated that GSA considers present responsibility before it takes action against the contractor; once it decides the contractor is not presently responsible and should be suspended or debarred, that decision is not negotiable.

DOD officials believe settlement agreements adequately protect the government's interest by documenting that the contractor is willing to make appropriate changes, such as firing employees involved in the wrongdoing, allowing access to internal audit reports, and establishing ethics programs. DOD officials noted that settlement agreements are usually made with larger firms, because they are more likely to be in a position to make needed changes, such as removing implicated corporate officials, and still remain viable. On the other hand, small one or two person firms, so-called "mom and pop" operations, generally cannot satisfy similar settlement agreement conditions and still remain in business since "mom and pop" are often the guilty parties. These officials also pointed out that DOD does not solicit such agreements—the contractor must come forward on its own with evidence that it is presently responsible.

DOD has recently started to encourage contractors to come forward and reveal fraudulent activities on their own, and at the same time outline the steps already taken to ensure that the fraudulent activity has ceased and will not recur. In this way, the contractor can help reestablish its present responsibility before DOD learns of the fraud through investigative or court actions, and thus preclude the need for suspension or debarment. This initiative, known as self-disclosure, is, in part, a response to the Packard Commission's questioning the need to suspend or debar contractors for actions which occurred several years earlier. (See p. 41.)

DOD Has Not Fully Implemented Some Recommended Improvements

DOD's suspension and debarment activities have been more heavily scrutinized than other federal agencies, both within and outside the agency. Within DOD, the Inspector General has taken the lead in monitoring and evaluating the effectiveness of the suspension/debarment process. In its May 1984 report, the DOD Inspector General recommended that each DOD suspension and debarment authority

- establish a system to ensure that information related to contractor responsibility and integrity is forwarded to the suspension and debarment authorities in a timely manner,
- ensure that suspension/debarment cases are processed on time,
- use preindictment suspensions whenever such action is appropriate,
- make effective use of administrative settlement agreements as an alternative to suspension/debarment actions,
- ensure the existence of effective and early communications between the suspension/debarment authorities and the agencies which investigate contract fraud, and
- coordinate suspension and debarment actions among each of the military departments.

The DOD Inspector General recommended that DOD military departments and agencies assure the centralized coordination of all civil, criminal, and contractual administrative actions in contract fraud cases. The DOD Inspector General further recommended that a DOD task force be formed to develop and implement uniform suspension and debarment procedures within the agency. As part of the DOD fiscal year 1986 Authorization Act, the Congress asked DOD for a status report on its efforts to implement these recommendations.

More recently, the Packard Commission echoed the DOD Inspector General's call for uniformity within DOD in the administration of the suspension/debarment process in its June 1986 report to the President.[6] However, the Commission also advocated relaxing the use of suspensions and debarments. The Commission recommended that such actions only be applied in cases where the contractor was found to be lacking in present responsibility. The Commission questioned the need to automatically suspend or debar a contractor for criminal or unethical conduct that may have occurred some years earlier. To address this concern, the

[6] A Quest for Excellence: Final Report to the President, the President's Blue Ribbon Commission on Defense Management, June 1986.

Commission recommended that the FAR be amended to provide more precise criteria for applying these sanctions and, in particular, for determining "present responsibility."

In April 1986, in an effort to respond to the congressional reporting requirement, and to address the Packard Commission recommendations, a joint high-level working group on suspension and debarment was formed. Headed by the Deputy Assistant Secretary of Defense for Procurement, the working group held its first meeting on April 16, 1986, and developed an agenda for cooperatively resolving some procedural issues. Issues being studied by the group include

- improved communications between investigative agencies and suspension/debarment authorities,
- existing and planned implementation of DOD Directive 7050.5 (coordinated remedies),
- actual time taken between indictment and suspension during fiscal year 1985,
- standardized criteria to be applied in settlement agreements, and
- more timely notice of suspension and debarment actions taken by non-DOD agencies.

All of the above issues relate to problems first identified in 1984—establishment of the group itself came almost 2 years after the Inspector General recommended that such a group be formed. To address some of these issues, such as establishing standard criteria for all settlement agreements, DOD is considering making changes to the existing regulations.

Implementing Regulations and Procedures Vary

While the FAR governs the suspension/debarment process for procurement contracts governmentwide, agencies have issued their own implementing regulations and procedures. All of these regulations and procedures, including the FAR, allow considerable leeway and discretion as to how the suspension/debarment process will be carried out, and under what circumstances these actions will be taken against contractors. Agency officials we spoke with believe this discretion is necessary, because each case which comes before the debarring official is unique and should be treated as such. However, DOD officials in particular acknowledged that certain procedures could be better coordinated and more uniformly applied DOD-wide.

DOD Supplemental Regulations and Directives Are More Explicit

To supplement the FAR, DOD has issued its own regulations which while consistent with the FAR, more explicitly define and prescribe responsibilities governing the debarment and suspension of DOD contractors. In addition, DLA, the Army, and the Air Force have issued their own implementing procedures. The Navy, on the other hand, relies on the FAR and DOD FAR supplement as its implementing procedures.

For example, section 9.405 of the DOD FAR supplement requires that if a debarment is not imposed following a felony criminal conviction, debarring officials must cite compelling reasons for not taking such action. Such exceptions to debarment must be approved, in writing, by the cognizant military department secretary or, for the defense agencies, the Under Secretary of Defense for Research and Engineering. This and other sections covering debarments based on felony convictions were added to address concerns raised by the Deputy Secretary of Defense and are applicable only within DOD.

An August 27, 1984, memorandum was issued from the Deputy Secretary of Defense to the secretaries of the military departments and directors of the DOD defense agencies to help ensure that DOD solicited offers and awarded contracts only to responsible contractors. This memorandum resulted in a number of sections being added to the DOD FAR supplement. For example, section 9.406-1, Debarment-General, requires that debarments based on felony convictions be commensurate with the seriousness of the crime. It states that the period of debarment should allow enough time for the contractor to eliminate the circumstances within its organization that led to the commission of fraudulent activities. Decisions not to debar, or to debar for less than 1 year, must be based on mitigating factors which clearly demonstrate that the contractor has taken effective remedial measures.

In addition to the DOD supplemental regulations, the Secretary and Deputy Secretary of Defense both issued policy statements and recommendations calling for the improved timeliness and effectiveness of actions against fraudulent contractors. For example, in a May 1983 memorandum to all defense agencies and military departments, the Secretary of Defense called for improvements in the investigation of defense contractor fraud and corruption, and asked that each department and agency designate a single authority to coordinate and monitor all criminal, civil, contractual, and administrative remedies relevant to developing cases of fraud and corruption. This requirement, as well as the "30-day rule" (see app. II), were later incorporated into DOD Directive 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities, dated June 1985.

DOD Departmental Procedures Vary

We found that DLA and the services differ in the way suspension and debarment cases are referred, reviewed, and finalized. Specifically, each has developed its own coordinated fraud remedies plan, which governs how fraud cases are referred and monitored, and each has established its own system for reviewing cases and for hearing contractors' appeals. Establishment of a coordinated fraud remedies plan has not been completed by all of the departments. DLA is the only agency to date to have fully implemented such a program.

DOD officials do not believe all of these procedures need to be standardized agencywide. However, DOD Inspector General officials have stressed the need for uniformity in one aspect of the process, that of hearing contractors' appeals. In its May 1984 report on suspensions and debarments, the DOD Inspector General concluded that, because each authority within DOD had developed its own procedures for notifying contractors and for holding hearings, the entire suspension and debarment process might be jeopardized. The Inspector General argued that if one military department provides a contractor with greater rights than another the entire DOD suspension and debarment process could be successfully challenged in court. A comparison of DLA and the services' procedures follows.

DLA Procedures

DLA's General Counsel is responsible for managing the agency's efforts to prevent, detect, and deter contract fraud and related irregularities, and is DLA's principal point of contact for dealing with the Department of Justice. Until June 1984, the General Counsel was also the debarring official. The Special Assistant for Contracting Integrity is now the

debarring official for DLA. DLA's Administrative Support Center assists in this effort by developing a case file on all suspension/debarment recommendations received from the field, and submitting recommendations to the debarring official.

Under DLA's system, the responsibility for case referrals and management is decentralized—DLA's counsels at field activities oversee all contract fraud criminal investigations to ensure that all available contractual, civil, criminal, and administrative remedies are pursued. The field counsels are also expected to ensure that suspension/debarment reports are promptly forwarded to the debarring authority. Once a criminal investigation is referred to the field counsel, the counsel notifies DLA's General Counsel, which tracks the status of these cases. The General Counsel oversees DLA's coordinated fraud remedies program. The General Counsel's computerized tracking system is linked with the field so that headquarters can obtain updated information on a daily basis.

If a contractor decides to contest DLA's decision to suspend or propose debarment, it has an opportunity to meet in person with the debarring official to provide evidence which would establish either that the debarment is unjustified, or that there is a genuine dispute of material fact. The debarring official can hold a fact-finding session, or have it done outside the agency by, for example, GSA's Board of Contract Appeals. The fact-finding official makes a written finding on each fact at issue, and submits the finding to the debarring official, who makes the final decision.

Army Procedures

The Army's procedures are similar to DLA's. According to the Army's coordinated remedies program regulation, that was effective August 1, 1986, the Judge Advocate's Contract Fraud Branch is responsible for coordinating all fraud remedies. This office, which is also responsible for supporting the debarring official, already has a case tracking system in place. This office receives notices of all cases opened by the Army's investigative unit, the Criminal Investigative Command. The major difference between the Army and the DLA systems is that Army cases are managed at the headquarters level, rather than in the field. The Chief of the Contract Fraud Branch reviews the cases referred to the Contract Fraud Branch by the Criminal Investigative Command, and asks the field to prepare suspension/debarment reports on those cases warranting such action.

The Assistant Judge Advocate General for Military Law is the debarring official; the Contract Fraud Branch within the Judge Advocate's office submits recommendations to suspend or debar contractors, based on case referrals, to the debarring official. The Army's procedures are written, well-defined, and are included in the Army supplement to the FAR.

If a contractor protests the Army's decision, it has an opportunity to submit evidence in person, in writing, or through an attorney directly to the debarring official, who may ask questions in return. When the hearing concludes, the debarring official can make a final decision, or within 30 days, decide if a genuine dispute over material facts has been raised. If the debarring official decides the factual dispute is genuine, a military judge from the Army Trial Judiciary is appointed by the debarring official to conduct a fact-finding procedure. These proceedings are not trial type hearings. Formal rules of evidence do not apply, but certain principles are observed. At the conclusion of the hearing, the judge will prepare written findings of fact and a transcript of the hearings. The debarring official then has 10 working days to notify the contractor of the decision to debar, or to continue the suspension.

Air Force Procedures

In contrast to DLA and the Army, the Air Force has established, through written regulations, a Debarment and Suspension Review Board (the Board) that reviews all of the cases for completeness, conducts fact-finding hearings, and provides recommendations to the debarring official. The debarring official, thus, does not normally meet directly with the contractor, but relies on the three-member Board.

The Air Force has designated its Inspector General as the single point of contact for overseeing the coordination of fraud remedies. The Air Force's Office of Special Investigations should notify the Air Force Inspector General whenever a significant case is opened. The Inspector General then tracks and monitors case information. According to officials from the Air Force Inspector General's office, efforts to develop such a computerized tracking system began around the first of fiscal year 1986, and will continue as this new coordinated remedies program goes into effect.

As with DLA, the initial coordinated remedies plan is supposed to be developed in the field, but the Air Force regulation does not specify who at the field level should be responsible for developing the plan. The regulation assigns this responsibility to whomever is considered to be the

responsible action officer. The regulations do provide a detailed sample format for the plan. Once completed, the coordinated remedies plan should be forwarded through the responsible major command to the Air Force Inspector General.

Field activities began developing remedies plans for new cases on June 1, 1986. According to one Air Force official, up to that time, no one was specifically responsible for overseeing case resolutions. The Board would thus only hear about those cases that had been sent forward by a contracting officer. The Air Force's Office of Special Investigations has an acquisitions advisor who coordinates with the suspension/debarment board. According to this advisor, those cases that should be reviewed for suspension/debarment action are referred to the Board. Thus, the Board does not automatically receive notices of all significant investigations, as does DLA's General Counsel. According to officials from the Air Force Inspector General's office, the Office of Special Investigations has now started to notify the Inspector General at the start of each new investigation, which in turn has begun referring some cases to the Board.

The Board members carry out their suspension/debarment responsibilities in addition to their other duties. The Chairman of the Board is currently from the Directorate of Contracting and Manufacturing Policy, and members representing the Contract Placement Division and the Office of the General Counsel also serve on the Board. Each member has one vote, and a simple majority is required to carry forward a recommendation to the Deputy Chief of Staff, Research, Development, and Acquisition, who is the debarring official. The Board is supported by the Contract Support Division of the Directorate of Contracting and Manufacturing Policy, and the Office of General Counsel, which helps review and prepare referred cases for presentation.

If a fact-finding hearing is warranted by a contractor's protest, the Board will convene, normally in the absence of the debarring official, and will allow the contractor to submit evidence or witnesses to the Board for questioning. However, the contractor may not confront the government witnesses. At the conclusion of the fact-finding hearing, a report of the Board's findings and recommendations is prepared and forwarded with the complete file to the debarring official. The debarring official then must review the file and the Board's recommendation in making a decision.

Navy Procedures

In contrast to the other three activities, the Navy has no written procedures other than the FAR and the DOD FAR supplement. However, the process used by the Navy is similar to that of the Air Force. Like the Air Force, the Navy has established a board to review cases and recommend actions. This board, the Navy Debarment Committee, serves on a full-time basis, and is made up of a chairman and two council members, as well as an advisor from the Navy Office of General Counsel.

The Navy's draft coordinated remedies program parallels that of the Air Force—the Navy Inspector General is to be the focal point, with plans to be developed initially by the responsible action commander and sent through the responsible chain of command to the Inspector General for oversight. The Navy Inspector General has already begun to track cases, and is in the process of developing an automated case tracking system.

According to one Navy official, the Navy plans to adopt the Air Force approach because it was already an established regulation. The Navy had initially developed a set of instructions in August 1985, but they were never approved. The instructions were not very specific—they merely stated that a coordinated remedies plan had to be developed, but did not specify what needed to be done, or who should do it.

As with the Air Force, the Navy had been relying on contracting officers to determine when suspension/debarment actions were warranted. As one Navy Inspector General official noted, before the Inspector General began tracking cases, the approach to suspensions and debarments was ad hoc, and depended on whether or not contracting officers decided to send reports forward recommending such action. In making recommendations based on fact-finding hearings to the Assistant Secretary of the Navy for Shipbuilding and Logistics (the debarring official) the Navy Debarment Committee's procedures resemble those followed by the Air Force.

Some Civilian Agency Regulations More Specific Than Others

Each of the five civilian agencies we reviewed has issued its own regulations to define and implement the suspension and debarment procedures outlined in the FAR. These regulations vary from agency to agency in the extent to which they explicitly define suspension and debarment procedures. Agency supplements to the FAR range from DOT regulations which, beyond designating the responsible agency officials, directly repeat the FAR, to DOE's, which prescribe explicit procedures for fact-finding hearings and other procedures.

DOT Procedures

DOT's implementing regulations are limited. Order 4200.5A implements the FAR suspension and debarment provisions by naming the responsible officials and emphasizing the need to report any suspension or debarment actions promptly to GSA. Attached to the order is an appendix which repeats the FAR exactly.

DOT, like DOD, has a decentralized procedure for processing suspension and debarment cases. DOT is organized into nine operating administrations and the Office of the Secretary. The agency order designates the head of each administration as the suspension and debarment officer for contracts awarded within that administration. The Office of the Secretary also has its own suspension/debarment officer. Thus, when cases come up for suspension or debarment action, they are handled within the operating administrations, or the Office of the Secretary, rather than on an agencywide level.

NASA Procedures

At NASA, the Assistant Administrator for Procurement Policy is the suspension and debarment authority for the entire agency. NASA's implementing procedures, as outlined in the NASA FAR supplement (18-9.4), are more detailed than those for DOT. For example, these regulations address how cases should be referred for suspension or debarment action. Section 9.470 of the NASA FAR supplement defines situations where suspected causes for contractor suspension or debarment should be reported to the agency's suspension/debarment officer. The section further prescribes the information that should be included in the referral, as well as comments and recommendations for suspension or debarment.

NASA's Office of the Inspector General has issued additional guidance for its personnel that focuses on policies and procedures regarding suspensions and debarments. This guidance defines and describes suspension and debarment, and describes the circumstances under which investigative information developed by the Inspector General may be shared with the agency's debarring official. In sharing this information, Inspector General personnel are to follow procedures designed to ensure that competing statutory and policy considerations, such as grand jury secrecy rules, are taken into account.

HHS Procedures

Subpart 309.4 of HHS' regulations implement the suspension and debarment regulations for that agency. HHS regulations identify the Assistant Secretary for Management and Budget as the agency's suspension/debarment official. They also define "initiating officials" as contracting

officers, heads of contracting activities, the Deputy Assistant Secretary for Procurement Assistance and Logistics, and the Inspector General. Any of these officials may refer a case for suspension or debarment.

As with NASA, HHS has regulations regarding reports that are to be submitted when a case is referred for suspension or debarment. HHS goes into greater detail than NASA in its regulations about fact-finding hearings—hearings that take place when, in the absence of criminal indictment or conviction, a dispute regarding the facts of the case occurs. However, the discussion is brief, mentioning only that the General Counsel's Office will represent the agency in the hearing and that discovery may take place.

GSA Procedures

At GSA, the suspension and debarment official is the Assistant Administrator for Acquisition Policy. The regulations set forth in GSA's FAR supplement (subpart 509.4, GSAR) are similar to those of NASA and HHS in identifying channels for referring cases to be considered for suspension or debarment, and describing the contents of referral reports. However, GSA's regulations are more explicit in that, among other things, they set up specific procedures for hearings in the event a contractor wishes to contest the agency's actions.

GSA's regulations provide procedures for conducting (1) oral arguments in response to a suspension or proposed debarment notice and (2) fact-finding hearings before the agency fact-finding official (the chairman of the GSA Suspension and Debarment Board, which is a part of the GSA Board of Contract Appeals). Instructions for fact-finding hearings include criteria for use in the judgment. GSA regulations also provide examples of situations where an existing contract should be terminated after suspension or debarment, while the FAR simply states that such contracts may continue.

GSA's Office of the Inspector General has also issued guidance about suspensions and debarments. Section 905.13 of the Inspector General's policy manual focuses on suspension and debarment investigations and referrals. This guidance defines, among other things, suspensions and debarments and the causes for them. It describes policies for initiating investigations, recommending action during ongoing investigations, and tracking referrals. Further, section 905.13E describes documents, format, contents, and timing of referrals for debarment. GSA and NASA were the only two of the five civilian agencies we reviewed to have written policies to ensure that the Inspector General, the primary source

of suspension and debarment referrals and investigations, has set procedures to follow.

DOE Procedures

DOE implementing regulations name the Director of Procurement and Assistance Management as the debarring official. These regulations, outlined in 10 CFR 1035, are the most explicit of the civil agencies we reviewed. For example, DOE regulations provide additional examples of causes for debarment beyond those explicitly stated in the FAR. These include commission of fraud connected with negotiating or performing private agreements, and inexcusable, prolonged, or repeated failure to pay a debt.

In addition, DOE regulations require the debarring official to coordinate with the Department of Justice to ensure that suspension or debarment will not interfere with any on-going investigations. These regulations also allow firms to withdraw voluntarily from seeking government contracts if no final suspension or debarment decision has been reached as yet and the action was not based on conviction, civil judgment, or indictment. This withdrawal is referred to as voluntary exclusion. Under DOE regulations, failure to observe the provisions of a voluntary exclusion is grounds for debarment.

Section 1035.8 of these regulations describes procedures and time limits, whereby contractors may contest a suspension or proposed debarment in writing, at an informal meeting, or at a fact-finding conference, depending on the circumstances. The regulations also describe the three-member fact-finding panel, evidence and argument rules, reporting procedures, and time limits for reaching a final decision. Section 1035.9 describes what is to be included in a notice of final decision.

DOE's instructions about proposed debarments differ from those used by other agencies. Specifically, DOE regulations state that if a notice of proposed debarment is issued to a contractor who has not been suspended, the proposed debarment will also act as a suspension. For that reason, DOE officials submit debarment proposals to GSA for inclusion on the Consolidated List. Other agencies, including DOD and GSA, have interpreted the FAR to mean that proposed debarments are to be effective only within the agency proposing the action, and do not have governmentwide applicability. To address this problem, GSA has recommended that proposed debarments be made effective governmentwide. (See appendix V.)

Compelling Reasons Provision Used Infrequently

As noted in appendix I, the FAR allows federal agencies to continue to do business with a suspended or debarred contractor if the agencies decide, and document, that compelling reasons exist for doing so. DOD is required, by statute, to submit these reasons to GSA.

We found that procuring agencies have used the compelling reasons exception sparingly, and in the case of DOD, debarring officials have turned down numerous other requests for such exceptions. However, we found that the short duration of certain DOD suspensions has enabled procuring officials to resume contracting without having to make such decisions for these cases.

Of the agencies we reviewed, DOD, GSA, and NASA have made use of this provision—DOD in 22 instances, GSA in 2, and NASA in 3. In all of these cases, these reasons were documented, and were approved by the debarring official, or in the case of the Air Force, the Acting Secretary of the Air Force.

While the FAR provides for these exceptions, it does not define or explain what might constitute a so-called compelling reason. In this respect, the DOD and NASA FAR supplements are more explicit in citing some examples of circumstances which might constitute grounds for continuing to contract with a suspended or debarred contractor. According to these FAR supplements, the following are some of the reasons that might be considered in justifying continued business with ineligible contractors:

- a sole-source situation where the products or services are available only from the listed contractor;
- an urgent requirement, which dictates that the agency deal with the contractor;
- situations where the contractor and the agency have entered into an agreement covering the same events which resulted in the suspension or debarment, and where the agreement includes a decision by the agency not to suspend or debar the contractor; and
- for other reasons, such as those related to national defense, which require continued business dealings with the contractor.

HHS regulations outline similar compelling reasons; other civil agency implementing regulations do not. None of these regulations outlines a specific format for these written justifications.

The Navy Has Granted Most DOD Exceptions

Officials from DLA and the services said they had all turned down requests from contracting officers to continue doing business with ineligible contractors, and stated that they believe the compelling reasons argument for such exceptions should be used sparingly. In all, the Navy had documented 17 such exceptions granted, the Air Force had 3, and the Army had 2 exceptions. DLA had not granted any exceptions. All but two of these cases involved contracts with General Electric. In addition, the Defense Communications Agency has granted exceptions to allow the Federal Aviation Administration to continue contracting with Paradyne. The circumstances surrounding this action were reviewed in a separate report, ADP Equipment: FAA's Use of a Suspended Contractor (GAO/IMTEC-86-23BR, July 1986).

While written justifications and approvals had been prepared for each case, we found written justifications for only two of the above cases on file at GSA, as required by law—for Paradyne and for a company called J.E.T.S., which was submitted by the Navy. Air Force officials said they were unaware of the law requiring written justifications to be on file at GSA; one Navy official said he was aware of the requirement, but was not aware that the Navy had granted 16 exceptions for contract actions with General Electric. The Army had on file a copy of one letter it sent to GSA. We were unable to determine why the memo was not on file at GSA.

Air Force Exceptions

General Electric was suspended by the Air Force for a period of about 5-1/2 months (from March 28 to September 13, 1985). However, within that time, the scope of the suspension was narrowed twice. On April 18, the Air Force partially lifted the suspension, with the remaining suspension effective only for the Space Systems Division. The suspension was further narrowed on July 30, when the Air Force announced that only the Re-entry Systems Operation would be suspended. On September 13, the Air Force signed a settlement agreement with General Electric, and lifted the suspension as part of the agreement.

Two of the three exceptions the Air Force allowed for General Electric were related to the Peacekeeper missile; the third involved classified information. In requesting exceptions for the Peacekeeper components, the Air Force Systems Command noted that General Electric was the sole qualified source for arming and fuzing assemblies, and only one of two sources for re-entry vehicles.

Navy Exceptions

All 16 of the Navy exceptions for General Electric products and services were granted between April 1 and 17, 1985. Of the 16, 9 involved ship repair and spare parts, 5 exceptions allowed the Navy to repair hospital equipment such as X-ray machines, and 1 was for the repair of aircraft component testing equipment. The remaining exception allowed the Navy to continue modernizing the U.S.S. Missouri, and involved the repair and testing of main propulsion turbines, reduction gear, and associated subsystems. In all but one of the cases, General Electric was cited as the sole-source supplier.

The other exception granted by the Navy occurred on September 30, 1983, and involved J.E.T.S., a company suspended by the Army 1 day earlier. The exception renewed the Navy's contract with J.E.T.S. for 1 year, to allow contracting officers time to find alternate sources for base maintenance and other services provided by the suspended firm.

Army Exceptions

One Army exception occurred in April 1983, and involved the contractor Crown Laundry and Dry Cleaners. In this case, Crown Laundry had been awarded a contract before being suspended. The contract, awarded on April 28, 1982, was for a base period of 1 year, with 2 option years. At the time the company was suspended (March 18, 1983), the contracting officer at Ft. Bragg, North Carolina, requested an exception in order to exercise the 2-year option.

The decision to grant the exception was based, in part, on a ruling we made on the contract before the suspension.[1] In response to a bid protest by another contractor, we found that Crown's bid was unbalanced and improper. However, we concluded that since the Army had already paid approximately 50 percent of the total cost it would incur for the entire 3-year period, it would be in the best interest of the government to allow the Crown award to stand. We further recommended that the Army exercise both renewal options to avoid windfall profits to Crown. The Army, in its memorandum to GSA, also stated that failure to exercise the option would cost the Army an additional $200,000 in increased costs.

The second Army exception involved General Electric. Due to the classified nature of the procurement, we did not request information on this action.

[1] B-206449.2, December 20, 1982 (82-2 CPD 548).

NASA and GSA Actions

NASA's exceptions also related to major defense contractors which had been suspended by the Air Force and Navy—General Electric and General Dynamics. All three exceptions approved by NASA's debarring official cited sole source as the compelling reason. Two of the cases involved General Electric, and were granted to refurbish a control system on a research satellite, and to modify and improve the space shuttle's waste management system. The exception involving the research satellite also cited the urgency of the requirement as justification for continued business with General Electric. The third exception allowed NASA to continue contracting with General Dynamics for the maintenance, repair, and support of the F-111 aircraft, a joint NASA-Air Force project.

GSA has allowed contracts with two ineligible firms to continue. One case involved Lanier Business Products, Inc., which was proposed for debarment in September 1983. The exception was granted for 1 month, to allow contracting officers time to make alternate arrangements for procuring the equipment and services Lanier was providing. The other case involves an ongoing contract with a subsidiary of Fischbach and Moore, Inc., for maintenance of the computerized building operations at one federal building. The compelling reason cited was sole source, due to the proprietary nature of the system.

Need for Exceptions Limited by Short Suspension Periods

Suspension actions against some of the major defense contractors, most notably General Electric and General Dynamics, have been for relatively short periods of time. This has enabled procuring agencies to resume contracting with the companies without having to make decisions regarding exceptions. For example, in the case of General Electric, the Navy exceptions were all granted within a month of the suspension action. The Air Force's partial lifting of the suspension in April enabled the Navy to continue contracting with General Electric without having to continue to grant additional exceptions.

In the case of General Dynamics, the Navy delayed the award of one major contract, and had eight requests for exceptions pending, during the 2-month suspension (December 3, 1985, to February 7, 1986). According to Navy documents, at least three such requests were deferred, while four others were not acted upon prior to the suspension being lifted. Only one such request was listed as actually being denied. Navy officials said they did not keep track of the requests to determine whether the contracts were in fact awarded once the suspension was lifted. As with General Electric, the suspension was lifted because of a settlement agreement reached between the Navy and General Dynamics.

In addition, the Navy had taken a previous action against General Dynamics in May 1985, which the Navy refers to as a suspension. However, the action was not officially a suspension, and merely resulted in about $700 million in contracts being held up until certain issues between the Navy and General Dynamics were resolved. Once the issues were resolved, the contracts were awarded to General Dynamics.

Suspension/Debarment Process Contains Deficiencies and Loopholes

We found that suspended or debarred individuals and firms are sometimes able to continue doing business with the government without exceptions being granted, due to weaknesses and loopholes in the existing regulations and procedures. In some instances, this continued business has occurred because the existing system is not working as well as it should; in others, it is because current regulations are unclear, or allow contractors to circumvent actions taken against them. Deficiencies, ambiguities, and loopholes include:

- contracting officers not being aware that the contractor has been suspended or debarred when they award a contract;
- lack of specific guidance on the application of restrictions on continued business dealings with suspended or debarred contractors, or on what grounds may be used to terminate such a contract, once a contractor has been suspended or debarred;
- suspended or debarred contractors selling products and services through established or newly formed affiliates;
- suspended or debarred contractors operating as subcontractors, where the prime contractor has not been suspended or debarred; and
- contractors that have been proposed for debarment by one agency continuing to contract with other agencies.

Led primarily by GSA, procurement officials have proposed changes to address some of the circumstances not covered by current regulations, or to improve the effectiveness of the current regulations. However, while these efforts have been under way for some time, none of the proposals have been put in effect. We believe the implementation of these proposals would strengthen and improve the existing regulations.

Lack of Timely Communication

As noted in appendix I, GSA is responsible for compiling the Consolidated List of Debarred, Suspended, and Ineligible Contractors, and for distributing this list to all executive agencies. While the FAR requires that GSA issue this list on a quarterly basis, with monthly updates, GSA publishes a complete list on a monthly basis, with weekly updates. GSA took these steps to improve the timeliness of the information. Efforts to provide computerized access to this system on a governmentwide basis have been underway since 1984, but have yet to be completed.

The GSA list is designed to provide a single, comprehensive listing of business firms and individuals who have been debarred, suspended, or otherwise excluded by government agencies from receiving federal contracts. The list is supposed to keep agencies informed about debarment

and suspension actions, and to help ensure that the government contracts only with responsible firms and individuals.

However, we found that in spite of efforts to improve communication, GSA still does not disseminate this information quickly. We believe the best way to ensure that such information is timely is to provide automated access to the GSA list governmentwide.

Since October 1982, GSA has published this list on a monthly basis. For publication, GSA contracts with the Government Printing Office, which prints and distributes some 13,000 copies each month to federal agencies and other interested parties. Because of the time required to compile and print this information, it takes about 30 to 40 days from the time GSA receives notice of an action to the time the action appears on the list. In addition, the cutoff date for the list is the 10th of each month—notices received by GSA from the various debarring officials after the 10th do not appear until the next month. Thus, it could take as much as 60 days for a new suspension or debarment action to appear on the list.

GSA started issuing weekly supplements to the list in April 1983, in an effort to improve the timeliness of its reporting. GSA distributes these supplements directly to some 108 agency representatives or contact points. Even with these supplements, delays occur because of the time needed for agencies to receive and disseminate this information.

In early 1984, GSA computerized the information contained on its list. However, this system continues to be accessible only within that agency. In September 1986, GSA developed an interim step to provide agencies with on-line computer access to the weekly updates. GSA is still considering options for implementing a governmentwide access system for the Consolidated List, and estimates such a system would not be in effect until calendar year 1987, at the earliest.

Contracts Awarded to Ineligible Contractors

While officials at a number of procuring agencies expressed concerns that contracting officers were not receiving updated information as quickly as they should, we found that none of the agencies routinely monitor contract awards to determine whether any new contracts are actually being awarded to ineligible firms. In 1983, the President's Council on Integrity and Efficiency attempted to do so on a governmentwide basis, by performing a computer match between firms cited

on the GSA Consolidated List and contract award data contained in the Federal Procurement Data System.

However, the results of this effort showed that it was difficult to use the computer match as an accurate indicator of agency compliance with the regulations. For example, analyses made at six agencies revealed that for the most part, what initially appeared to be "matches" (cases where someone on the list had been awarded a contract) were not, for any of several reasons—the contract had actually been awarded before the suspension or debarment; the contractor names which appeared to match were, in fact, different; contracts identified had already been completed by the time the action was taken; or contract actions involved modifications not related to extending or otherwise continuing business with the contractor in question.

Although such a computer matching technique could provide a useful tool for monitoring the effectiveness of the system and for assessing the impact of delays in GSA's reporting system on contract awards to ineligible firms, no further efforts have been made to correct the problems initially encountered, or to test the computer matching concept again. GSA officials say they lack the resources necessary to correct the problems identified above.

At DOD, the Inspector General has used computer matching techniques to determine whether suspended or debarred contractors have received new contract awards. However, it has only used this technique on an ad hoc basis, when it received information that such new contracts had been awarded. According to a DOD Inspector General official, this type of review of contract actions has been limited to three companies—Paradyne, Alamo Aircraft Supply, Inc., and the Beta Corporation. In each case, the DOD Inspector General reviewed DOD's contract action information system, the DD350, and determined that new contracts had in fact been awarded after the companies were suspended, proposed for debarment, or debarred. Initial information about the Alamo and Beta contracts were developed by personnel from the Defense Contract Administration Service.

DOD agency and service responses to DOD Inspector General questions about these actions point out the various weaknesses in the existing system. For example, in responding to the Inspector General's complaint that Alamo was awarded at least 20 contracts after DLA proposed the firm for debarment, both the Navy and DLA commented that their contracting officers had not received timely information about the proposed

debarment. Similarly, in the Beta Corporation case, information developed by the Defense Contract Administration Service revealed that in one instance, a buyer did not have an accurate suspension/debarment list showing Beta's ineligibility. Another buyer believed the firm was eligible to receive awards because it had only been proposed for debarment, and was not yet debarred.

FAR Provisions on Continuation/ Termination of Existing Contracts Are Unclear

We used the Paradyne case to run our own check of the effectiveness of DOD's efforts to avoid contracting with suspended or debarred contractors. To determine whether DOD had awarded any new contracts to Paradyne since it was suspended by HHS on December 16, 1985, we reviewed the DD350 system for the first 6 months of fiscal year 1986. We identified three contract actions—one by the Defense Communications Agency on December 31, 1985, one by the Army on February 3, 1986, and one by the Navy on February 13, 1986. During the course of its earlier review of Paradyne contracts, the DOD Inspector General had been told by the Defense Communications Agency that it had not received word of the suspension until January 13, 1986. The other two cases were considered to be orders placed under, or extensions of, existing contracts.

Our review of the circumstances surrounding the Navy and Army contract actions revealed that the FAR provisions covering the continuation and termination of existing contracts are unclear. The FAR does not specify how the application of restrictions on existing and new contracts applies to certain types of actions, nor does it specify whether an existing contract may be terminated for convenience or default. One DOD Inspector General official, who was involved in the development of both the 1982 policy letter and the implementing regulations, stated that at the time the regulations were developed, the matter of more specifically identifying the types of contract actions that should be allowed to continue under existing contracts was not at issue.

Continuation of Contracts

Defining existing contracts is important in deciding what actions are in the best interest of the government once a contractor has been suspended or debarred. Under the FAR, contracts in existence prior to the suspension or debarment action may remain in effect, but cannot be renewed or otherwise extended unless compelling reasons exist for doing so. Therefore, if certain individual procurement actions taken after a contractor has been suspended or debarred are considered to be orders placed against previously awarded contracts, they are allowable.

If they are new contract actions, renewals, or extensions, they are not allowable without a compelling reasons determination. This question is very important for those types of contractual arrangements that allow multiple purchases to be made over the life of the contractual arrangement.

For example, certain types of agreements the government enters into with prospective contractors, such as basic ordering agreements and nonmandatory multiple awards schedules, describe the contractual terms and conditions to be used in the event an agency chooses to buy from that particular supplier. However, such agreements do not obligate the government, and agencies are not required to place orders with these suppliers.

Other types of contractual arrangements can be used when the procuring agency does not know the specific quantity it will need during a stated period of time. These include definite quantity, requirements, or indefinite quantity contracts. Definite quantity and requirements contracts require the agency to purchase all of its requirements from that particular contractor. Indefinite quantity contracts, on the other hand, obligate the government to purchase only a minimum quantity.

In reviewing DOD contract actions with Paradyne since its suspension, we found the Army contract action was actually issued under the GSA's Automated Data Processing multiple awards schedule, and was for the renewal of a lease of Paradyne equipment. According to GSA, this schedule, which had been awarded to Paradyne 2 weeks before it was suspended, is nonmandatory.

After Paradyne was suspended, GSA decided to allow agencies to issue orders to continue to lease or maintain and repair equipment under the existing schedule (including conversions of rental to purchase), but not to issue orders to lease, rent, or purchase any new equipment. GSA considers the nonmandatory multiple awards schedule as a contract in itself. In taking this action, GSA officials stated they believed GSA was acting in the best interest of the government, and cited the FAR suspension and debarment provisions about continuing and terminating existing contracts. Based on GSA's decision, the Army contract action was an order placed under an existing contract and, therefore, allowable, without a compelling reasons determination.

We also found that the Army was planning to issue an order against the GSA contract for the purchase of new Paradyne equipment. Army officials told us they had already been notified by a competitor that Paradyne was suspended, and did not issue the order. The Army later contracted with another company which is planning to supply the Army with Paradyne equipment through a subcontract. As noted on page 63, the FAR does not specifically preclude such subcontracting.

We found that the Navy action was also not a new contract award, but rather an order placed under a fixed quantity contract that had been awarded to Paradyne on May 9, 1984, before the suspension. The Navy has actually placed five such orders between February 13 and April 4, 1986. Navy officials cited the FAR (part 9.406) in justifying their actions, and further stated that because the contract is a definite quantity contract, the government is obligated to order the quantities it had agreed to.

Agency officials agreed that the FAR does not explain how to deal with certain types of contractual arrangements, such as the nonmandatory multiple awards schedule, the basic ordering agreement, and the indefinite quantity contract. In contrast to GSA's handling of the Paradyne multiple awards schedule, DLA considers any individual orders placed under basic ordering agreements to be new contracts. For that reason, DLA does not allow orders to be placed, extended, or renewed, once a contractor is suspended or debarred, unless compelling reasons exist for doing so.

Termination of Contracts

DOD officials noted that the indefinite quantity contract poses a different sort of problem. Once the government has met the minimum quantity requirement, and the contractor is suspended or debarred, it is not clear whether the government can stop issuing new orders under that contract without terminating the contract for convenience. One DOD Inspector General official argued that even with a definite quantity contract, such as the Navy contract with Paradyne, the government is under no obligation to continue to meet the terms of the contract, since the contractor has been declared nonresponsible. He argued that the government could terminate such a contract for default.

However, according to existing procurement regulations, the government may terminate a contract for default only when a contractor has failed to perform on that specific contract. Based on these regulations,

other agency officials have concluded that unless a contractor is suspended or debarred for actions specifically related to the contract in question, the FAR suspension and debarment provisions allow the government to terminate existing contracts for convenience, but not for default. A key difference between termination for convenience and default is the cost to the government. Termination for the convenience of the government requires the government to compensate the contractor for losses associated with the termination. Under termination for default, the contractor is not entitled to such compensation.

One GSA official suggested that language could be included in procurement contracts stating that the suspension or debarment of the contractor during the course of that contract could constitute a breach of contract. The procuring agency would then have the option of terminating the contract for default, even if the contractor had been suspended or debarred for actions unrelated to that specific contract, if termination were determined to be in the government's best interest. However, agency officials have not officially proposed changes to the FAR to better define existing contracts, or to provide procuring officials with the option of terminating a contract for default once a contractor has been suspended or debarred.

Existing Regulations Contain Deficiencies and Loopholes

In addition to the contract definition problems identified above, the current regulations contain other deficiencies and loopholes which may allow suspended or debarred contractors to continue doing business with the government. Specifically, the regulations do not preclude government prime contractors from subcontracting with suspended or debarred contractors. Only those subcontracts requiring government consent are affected. According to one DOD official, such subcontracts are primarily limited to prime contracts involving major weapon systems.

Moreover, neither the FAR nor the DOD FAR supplement provides adequate guidance as to what constitutes an affiliate, or how the existence of such an affiliation could be detected. The FAR allows agency debarring officials to extend the application of suspensions or debarments to affiliates. The FAR defines an affiliate as a business concern or individual that either directly or indirectly controls another firm or individual, or a third concern that controls both. However, it does not describe the types of conditions that would serve as indicators of affiliation. Instances where contractors are suspended or debarred and then reorganized to form a new company require that agencies first detect the situation and

then establish that the new company is, in fact, an affiliate. DOD debarring officials have encountered several such situations.

As noted in appendix I, one of the reasons for establishing the existing suspension and debarment regulations was to ensure that actions taken against a contractor by any one executive agency would be effective governmentwide. However, one such action, that of proposing debarment, is effective only within the agency taking that action. For example, after HHS proposed Paradyne for debarment in March 1985, DOD continued to award the company new contracts. Because proposed debarments are not effective governmentwide, the HHS action was not recorded in the GSA Consolidated List.

Agency Proposals to Change FAR

Proposals by executive agencies, led by GSA and DOD, to correct some of the areas not covered by current regulations, or to improve the effectiveness of the current regulations, have been considered for some time. However, to date, none of the proposals made by GSA have been put into effect on a governmentwide basis. The DOD proposals, if approved, would cover only the defense agencies. Furthermore, conflicting proposals have been made by the defense and civilian acquisition councils, and disagreements between the two councils have not yet been resolved.

The Civilian Agency Acquisition Council, which approves all changes to the FAR on behalf of civil agencies, approved several such changes on January 22, 1986. These changes would extend the coverage of proposed debarments to include all executive agencies, require contractors to certify whether they or their affiliates had been suspended or debarred, better define affiliation, and increase the usual period of debarment from 3 to 5 years. However, to be incorporated into the FAR, these changes must also be approved by the Defense Acquisition Regulatory Council, which acts on behalf of DOD and NASA. The civilian and defense councils met on August 7, 1986, to develop one set of proposed changes acceptable to both councils.

At the time the civilian council made its proposals, the Defense Acquisition Regulatory Council proposed its own version of a self-certification, which would require contractors to certify whether they have been debarred or suspended, and whether they are subcontracting with any such firms. This council had originally rejected both self-certification proposals in May 1984. However, the defense council's proposed changes are to be effective only DOD-wide, and would only change the DOD FAR supplement, not the FAR. The official DOD proposals appeared in

the March 6, 1986, Federal Register, with a request for comments. DOD is currently reviewing these comments.

In contrast to the defense council proposal, the civilian council self-certification proposal does not extend to subcontracting, but is broader in its coverage of prime contractors in that it would also require that they state whether they or any of their affiliates have been indicted or convicted of any crimes or defaulted on any government contracts. Currently, only the Air Force and GSA make use of self-certifications as a means of an additional check against contracting with ineligible contractors. However, neither of these self-certifications extends to the subcontracting level.

In commenting on the DOD proposal, the Civilian Agency Acquisition Council noted that it had provided its version of the self-certification in February 1986 for inclusion in the FAR. The Civilian Agency Acquisition Council also pointed out that if the DOD changes regarding subcontracting were to be implemented, the DOD FAR supplement would not agree with the FAR. The civilian council further suggested the two councils work together to address the issue of subcontracting. Civilian and defense officials are not in agreement on this issue—GSA officials believe only key types of subcontracts should be included; the DOD proposal would amend the DOD suspension and debarment regulations to include all subcontracting.

GSA and the Air Force have both proposed to their respective procurement councils that the FAR be modified to more explicitly define what constitutes an affiliate. As noted above, the civil council self-certification would also apply to affiliates. The Air Force proposal was submitted to the Defense Acquisition Regulatory Council on November 26, 1985, and recommends that DOD adopt some of the language found in the Small Business Administration's regulations. The GSA proposal outlines some of the indicators of control, such as interlocking management or ownership, shared facilities and equipment, or identity of interests among family members.

In making its proposal, the Air Force noted that as debarments and suspensions increase, agencies can expect to see sham corporate reorganizations or "new" corporations formed solely to avoid such actions. DOD officials have encountered a few such cases, including companies controlled by debarred contractors Lawrence Tron and Leo F. Schweitzer.

The Air Force also noted that such efforts are both easy and inexpensive for the company to accomplish, and that they may become more prevalent as suspensions and debarments increase.

Request Letter

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

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The Honorable Charles A. Bowsher
Comptroller General
General Accounting Office
Washington, D.C. 20548

Dear General:

See comment 1

I've been increasingly concerned with the reluctance of many executive agencies to initiate suspension and debarment procedures against unethical contractors. This problem is further exacerbated by the lack of consistency in implementing these procedures from one agency to the next. For example, the Department of Health and Human Services (HHS) still has not initiated debarment proceedings against the Paradyne Corporation in spite of the fact that the company and its top officials have been indicted on various charges, including bribery, fraud and obstruction of justice. In fact, it is my understanding that HHS has never debarred one of its contractors even though it has one of the largest procurement budgets in the government. On the other hand, the Defense Department in recent years has placed a higher emphasis on suspension and debarment because it is one of the most effective ways to deal with unscrupulous contractors.

In my view, it is imperative that all Federal agencies have effective suspension and debarment procedures that are uniform across the government. Therefore, I request that you selectively review the implementation of these procedures at each of the major procuring agencies to determine what specific actions need to be taken to strengthen this process. In conducting this review, you should also determine whether: (1) suspension and debarment procedures should be established by statute, (2) suspension and debarment actions should be assigned to the various boards of contract appeals, and (3) explicit guidance should be given to contractors explaining what types of business practices could subject them to suspension and debarment proceedings.

I would appreciate your findings, conclusions and recommendations by June 1986.

Sincerely,

JACK BROOKS
Chairman

The following is a GAO comment on the request letter dated January 13, 1986.

GAO Comment

1. GAO staff did brief the Committee's staff on the results of our work in June 1986. This report was prepared for the continuing use of the Committee and others interested in this topic.

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